DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1205
Title: Keith Smith, et al., Petitioners
v.
Bayer Corporation
Docketed: April 7, 2010
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (09-1069)
Decision Date: January 5, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Apr 5 2010	Petition for a writ of certioran filed. (Response due May 7, 2010)
May 18 2010	DISTRIBUTED for Conference of June 3, 2010.
May 25 2010	Response Requested. (Due June 24, 2010)
Jun 24 2010	Brief of respondent Bayer Corporation in opposition filed.
Jul 7 2010	DISTRIBUTED for Conference of September 27, 2010.
Sep 22 2010	Reply of petitioners Keith Smith, et al. filed. (Distributed)
Sep 28 2010	Petition GRANTED.
Nov 8 2010	SET FOR ARGUMENT ON Tuesday, January 18, 2011.
Nov 12 2010	Brief of petitioners Keith Smith, and Shirley Sperlazza filed.
Nov 12 2010	Joint appendix filed. (Statement of Costs received).
Nov 19 2010	Brief amici curiae of Steven J. Thorogood & Martin Murray filed.
Nov 19 2010	Brief amicus curiae of American Association for Justice filed.
Nov 26 2010	CIRCULATED.
Dec 10 2010	Record received from U.S.C.A. for 8th Circuit. (1 box)
Dec 13 2010	Brief of respondent Bayer Corporation filed. (Distributed)
Dec 20 2010	Brief amicus curiae of Product Liability Advisory Council, Inc. filed. (Distributed)
Dec 20 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Dec 29 2010	Supplemental brief of respondent Bayer Corporation filed. (Distributed)
Jan 10 2011	Record received from U.S.D.C. for the District of Minnesota. (1 Box)
Jan 11 2011	Reply of petitioners Keith Smith, et al. filed. (Distributed)
Jan 18 2011	Argued. For petitioners: Ricahrd A. Monahan, Charleston, W. Va. For repondent: Philip S. Beck, Chicago, Ill.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 091205 APR 5 - 2010

In the OFFICE OF THE CLERK

Supreme Court of the United States

KEITH SMITH and SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Among the elements for the doctrine of collateral estoppel to be used in support of the relitigation exception to the Anti-Injunction Act are requirements that the state parties sought to be estopped are the same parties or in privity with parties to the prior federal litigation and that issues necessary to the resolution of the proceedings are also identical. In determining whether issues are identical, courts have also recognized that state courts should have discretion to apply their own procedural rules in a manner different from their federal counterparts. Can the district court's injunction be affirmed when neither the parties sought to be estopped nor the issues presented are identical?

2. It is axiomatic that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by designation or service of process. One exception to this rule are absent members of a class in a properly conducted class action because of the due-process protections accorded such absent members once class certification has been granted. Does a district court have personal jurisdiction over absent members of a class for purposes of enjoining them from seeking class certification in state court when a properly conducted class action had never existed before the district court because it had denied class certification and due-process protections had never been afforded the absent members?

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Keith Smith and Shirley Sperlazza respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals affirming the injunction is reported at 593 F.3d 716 and is reproduced in the Appendix at 1a-19a. The order of the United States District Court for the District of Minnesota granting the permanent injunction against petitioners has not been officially reported but is available at 2008 WL 7425712 and is reproduced in the Appendix at 20a-34a. The prior order of the district court in which it denied certification of a West Virginia class action and granted judgment against George McCollins has yet to be officially reported but is available at ___ F.R.D. ___, 2008 WL 7416660 and is reproduced in the Appendix at 35a-52a.

JURISDICTION

This petition for writ of certiorari is filed under Rule 10 of the Rules of the Supreme Court of the United States. The Eighth Circuit filed its decision on January 5, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review a circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o

person shall . . . be deprived of life, liberty, or property, without due process of law . . . . U.S. Const. Amend V.

The Anti Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1970).

The All-Writs Act provides, in relvant part, that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1988).

STATEMENT OF THE CASE

On September 20, 2001, Petitioners, Keith Smith and Shirley Sperlazza, together with Nancy Gandee,[1] filed a civil action, *Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (1-3) JPM (Cir.Ct. Brooke County, W.Va. Sept. 20, 2001), in the Circuit Court of Brooke County, West Virginia, seeking certification of a West Virginia-only class action concerning state-law claims regarding the manufacture, sale, advertisement, warnings, and use of Baycol. As set forth in their complaint, the *Smith* plaintiffs sought certification of a class of "all

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[1] Plaintiff Nancy Gandee settled her claims against Bayer in July 2003 and is no longer a proposed representative or member of the putative class in *Smith*. The plaintiffs had also originally sued two, non-diverse West Virginia citizens who subsequently were dismissed at or about the time that Nancy Gandee settled her claims.

West Virginia residents and others who have ingested Cerivastatin, sold under the trade name 'Baycol' in West Virginia" and requested damages for personal injury, medical monitoring, and economic loss.

On September 30, 2008, Petitioners filed a motion seeking certification of only an economic-loss class based upon their claims of common-law fraud, breach of warranties, and violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA").[2] A class-certification hearing was scheduled in *Smith* for December 10, 2008.

On October 31, 2008, Respondent Bayer Corporation filed an expedited motion for a permanent injunction, seeking to enjoin the class-certification hearing on the basis that on August 25, 2008, the United States District Court for the District of Minnesota, which had been designated as the MDL Court for Baycol Products Litigation, had denied certification of a proposed West Virginia class concerning economic-loss claims arising from the sale and use of Baycol in *McCollins v. Bayer Corp.*, No. 02-0199.[3]

Petitioners–who neither were named plaintiffs in *McCollins* nor had received notice of *McCollins* and the motions regarding class certification filed therein–opposed Bayer Corporation's expedited motion for a permanent injunction. Petitioners appeared specially

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[2] W.Va.Code § 46A-6-101, *et seq.*

[3] *In re Baycol Prods. Litig., McCollins v. Bayer Corp.*, MDL NO. 1431, No. 02-0199, ___ F.R.D. ____, 2008 WL 7416660 (D.Minn. Aug. 25, 2008) (Davis, C.J.). Appen. at 35a-52a.

to contest personal jurisdiction and to oppose the injunction being issued under the All-Writs Act and the relitigation exception to the Anti-Injunction Act.

Contrary to the suggestion of Bayer Corporation, Petitioners had not rested on their laurels waiting to see the outcome of the class-certification hearing in *McCollins* before seeking their own class certification in West Virginia. During the relevant time frame, Petitioners had no knowledge that *McCollins* or any other Baycol case seeking certification of a West Virginia class action was pending before the district court.[4] Indeed, several earlier dates for a class certification hearing had been set in *Smith* but had been continued due to the need for more discovery or scheduling conflicts.

By Order entered on December 9, 2008, the district court granted Bayer Corporation's expedited motion for a permanent injunction.[5] Petitioners timely appealed such ruling to the Eighth Circuit which has jurisdiction to hear an appeal of an interlocutory order of a district court granting an injunction under 28 U.S.C. § 1292(a)(1). On January 5, 2010, the Eighth

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[4] Counsel for Petitioners were aware that an MDL Court had been established to handle Baycol litigation pending in federal court because they had one or more individual actions removed to federal court and transferred to the MDL. But none of those cases involved requests for class-action certification.

[5] *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 (D.Minn. Dec. 9, 2008) (Davis, C.J.). Appen. at 20a-34a.

Circuit issued its opinion affirming the district court's grant of the injunction.[6]

REASONS FOR ALLOWANCE OF WRIT

The Eighth Circuit's opinion in this case creates and/or adds to conflicts between Circuit Courts of Appeal[7] on the important questions of (1) whether a district court can utilize the doctrine of collateral estoppel under the relitigation exception of the Anti-Injunction Act in order to estop and enjoin plaintiffs in state court from seeking certification of a statewide class under the state's procedural rules when the district court had previously denied certification of a similar, statewide class under federal procedural rules;[8] and (2) whether a district court has personal jurisdiction over absent members of a once-proposed class–who never were afforded the due-process protections owed to class members in properly conducted class actions because of the court's denial of class certification–so as to permit it to estop and enjoin them from seeking class certification in state court.[9]

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[6] *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010). Appen. at 1a-18a.

[7] *See* Sup. Ct. R. 10(a).

[8] *See J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998).

[9] *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 141; *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006).

Indeed, the Eighth Circuit's rulings on these questions also indirectly run afoul of this Court's recent holding[10] in *Taylor v. Sturgell*,[11] wherein the Court rejected the doctrine of virtual representation. In so holding, this Court noted that absent members of a properly conducted class action were exceptions to the general rule that every person is entitled to his own day in court because of the due-process protections afforded absent members once class certification is granted.[12] No such due-process protections are afforded to absent members of a class when class certification is denied rather than granted. In such instance, a class action, properly conducted or otherwise, simply does not exist.

Similarly, the Eighth Circuit's holding on the first question stated above also indirectly conflicts with this Court's decision in *Chick Kam Choo v. Exxon Corp.*,[13] wherein the Court held that a state court should be permitted to apply its own procedural rules governing access to its courts and that the relitigation exception to the Anti-Injunction Act could not be used to enjoin such state-court proceedings solely on the basis that a federal court had previously applied its own procedural rules to the same issue.

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[10] *See* Sup. Ct. R. 10(c).

[11] ___ U.S. ___, 128 S.Ct. 2161, 2171-73 & 1276 (2008).

[12] *Ibid.*

[13] 486 U.S. 140, 148-49 (1988).

I. The Eighth Circuit's Opinion Conflicts With Decisions Holding That An Injunction Cannot Be Issued Based Upon The Doctrine Of Collateral Estoppel And The Relitigation Exception To The Anti-Injunction Act Where Neither The Parties Nor The Issues Are Identical

The Anti-Injunction Act is premised upon principles of federalism and comity and absolutely prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[14] This Court has consistently cautioned that "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."[15] The exceptions to the Act's prohibition of injunctions were "designed to ensure the effectiveness and supremacy of federal law" and are to be narrowly construed.[16] In this case, Respondent Bayer Corporation has only advanced, and the Eighth Circuit has relied upon, the third of the Act's exceptions, commonly known as "the relitigation exception." The relitigation exception is

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[14] 28 U.S.C. § 2283 (1970).

[15] *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 286-87 (1970). *Accord Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146-50; *Kline v. Burke Construction Co.*, 260 U.S. 226, 229-30 (1922).

[16] *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146.

based upon principles of *res judicata* and collateral estoppel.[17]

When an exception to the Anti-Injunction Act applies, the All-Writs Act[18] provides the positive authority for a federal court to issue an injunction against state-court proceedings.[19] Both the All-Writs Act and the relitigation exception to the Anti-Injunction Act are permissive and non-mandatory in nature.[20] Before issuing an injunction the federal court must already independently possess both subject-matter jurisdiction and personal jurisdiction over the state-court action and litigants because neither the All-Writs Act nor the Anti-Injunction Act creates such jurisdictional prerequisites.[21]

As recognized by the Eighth Circuit, a federal court applies federal common law in determining the preclusive effect of an order denying certification. Under federal common law, a federal court will "usually incorporate the collateral estoppel doctrine of the relevant state unless it is 'incompatible with federal interests[,]' in which case 'a contrary federal

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[17] *Ibid.*, 486 U.S. at 147.

[18] 28 U.S.C. § 1651(a) (1988).

[19] *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 143.

[20] *Bailey v. State Farm Fire and Cas. Co.*, 414 F.3d 1187, 1189 (10th Cir. 2005).

[21] *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31-34 (2002); *Carlough v. Amchem Prods. Inc.*, 10 F.3d 189, 198 (3d Cir. 1993).

rule' may be justified."[22] Under West Virginia law, among the elements for applying the doctrine of collateral estoppel are requirements that the issues previously decided be identical to the ones presently at issue and that the parties against whom the doctrine is sought to be invoked were parties or in privity with parties to the prior action.[23]

In the instant action, neither the parties nor the issues are the same. All, save one,[24] of the cases relied upon by Bayer Corporation in support of invoking the relitigation exception to the Anti-Injunction Act were easily distinguishable because the parties sought to be estopped had been named parties to the prior action in which class certification had been denied.[25]

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[22] *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716, 721 (8th Cir. 2010) (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001)).

[23] *State v.* Miller, 459 S.E.2d 114, 120 (W.Va. 1995); *Conley v. Spillers*, 301 S.E.2d 216, 220-21 (W.Va. 1983).

[24] The one exception, which will be discussed *infra*, is *In re BridgeStone / Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003).

[25] *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1012 & 1015 (8th Cir. 2002) (court noting "ten of the original plaintiffs from *Canady I* filed two new class actions in Missouri state court" and "[i]t is undisputed that the eighteen *Saunders* defendants also were named as defendants in *Canady I*. Therefore, the parties are undeniably the same in both cases."); *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 216 & 218-19 (8th Cir. 1977) (upon denial of request for class certification in a Florida state court, the same plaintiff then filed six other proposed class actions in federal district courts); *In re Dalkon Shield Punitive Damages*

As to the issues presented, not only have petitioners asserted a common-law claim of fraud which was not asserted by the plaintiffs in *McCollins*,[26] but even more importantly the West Virginia Circuit Court would be determining class-certification issues under Rule 23 of the West Virginia Rules of Civil Procedure rather than under Rule 23 of the Federal Rules of Civil Procedure which was utilized by the district court in *McCollins*. Several courts,[27] including at least two United States Circuit Courts of Appeals, have expressly held that state courts should be permitted to exercise their discretion under their own rules of procedure addressing certification of class actions differently than their federal counterparts.[28]

Litig., 613 F. Supp. 1112, 1116 (E.D.Va. 1985) (same defendant seeking certification of a class on issue of punitive damages).

[26] Petitioners' common-law claim of fraud is not simply a new theory of liability raised in support of a previously asserted cause of action but is an entirely separate cause of action from the statutory cause of action for deceptive practices under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W.Va.Code § 46A-6-101, *et seq.*

[27] *See, e.g., J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d at 180; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen v. Stewart Title Guar. Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 (E.D.Pa. Mar. 20, 2007).

[28] Petitioners note that the Eighth Circuit's decision in *Canady v. Allstate Ins. Co.*, *supra*, does not detract from this point. In *Canady*, the civil action sought to be enjoined had been removed to federal court and, because it was mistakenly believed that subject-matter jurisdiction existed for the removal under the All-Writs Act, 28 U.S.C. § 1651(a) (1988), the Eighth Circuit believed that the district court did not need to be concerned about any distinction between federal and state procedural rules because

As explained by the Fifth Circuit in *J.R. Clearwater Inc. v. Ashland Chem. Co.*:

> The denial of class certification is "a procedural ruling, collateral to the merits of a litigation. . . . ," *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336, 100 S.Ct. 1166, 1173, 63 L.Ed.2d 427 (1980), and the decision as to whether to certify a class lies within the "wide discretion" of the trial court. . . . . While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, . . . *a Texas court might well exercise this discretion in a different manner.* It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that *each court-or at least each jurisdiction-be free to make its own determination in this regard. . . . This reasoning is particularly applicable when matters of state-federal relations are involved* as in the present case in which an injunction would impinge upon the state court's ability to exercise discretion in the administration of its

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under *Erie* principles and Fed.R.Civ.P. 81(c) the district court was to apply its own procedural rules. *Canady*, 282 F.3d at 1016-17 & 1019. The Eighth's Circuit's view that subject-matter jurisdiction existed for the removal under the All-Writs Act was incorrect. *See Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. at 31-34; *Arkansas Blue Cross and Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821-22 (8th Cir. 2009).

> own docket *contrary to the policies underlying the Anti-Injunction Act.*[29]

Similarly, the Third Circuit has also held that its interpretation of Rule 23 of the Federal Rules of Civil Procedure is not binding on a state court applying its own rule of procedure regarding class certification and that neither itself nor the district court had authority to enjoin the state-court proceedings. As held by the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*:

> [T]he decision by this Court to reject the provisional settlement class is not a "judgment" with respect to the Louisiana settlement agreement, and *our interpretation of Rule 23 is not binding on the Louisiana court. . . . [O]ur construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23.* Rather, the Louisiana court properly applied La.Code Civ. Proc. Ann. Arts. 591 and 592, the parallel Louisiana class certification rule.[30]

The fact that a state court should be permitted to apply its own procedural rules governing access to its courts and that the relitigation exception to the Anti-Injunction Act cannot be used to enjoin such state-court proceedings solely on the basis that a federal court had previously applied its own procedural rules

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[29] 93 F.3d at 180 (emphases added; internal citations omitted).

[30] 134 F.3d at 146 (emphases added; footnote omitted).

to the issue in question is also demonstrated by this Court's opinion in *Chick Kam Choo v. Exxon Corp.*, *supra*. More specifically, this Court rejected the issuance of an injunction under the relitigation exception to the Anti-Injunction Act, reasoning that a Texas state court's determination of whether Texas' *forum non conveniens* analysis would permit a plaintiff to bring Singapore-law claims could not be foreclosed by a federal court's prior decision dismissing such claims under federal *forum non conveniens* principles.

As explained by this Court:

> [T]he only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine. *Federal forum non conveniens principles simply cannot determine whether Texas courts, which operate under a broad "open-courts" mandate, would consider themselves an appropriate forum for petitioner's lawsuit.* . . . Respondents' arguments to the District Court in 1980 reflected this distinction, citing federal cases almost exclusively and discussing only federal *forum non conveniens* principles. . . . Moreover, the Court of Appeals expressly recognized that the Texas courts would apply a significantly different *forum non conveniens* analysis. . . . *Thus, whether the Texas state courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated, and an injunction to foreclose*

consideration of that issue is not within the relitigation exception.[31]

The Eighth Circuit, adopting the district court's reasoning, has attempted to sidestep this issue by holding (1) that Petitioners have not pointed to any significant substantive or procedural differences between Fed.R.Civ.P. 23 and W.Va.R.Civ.P. 23,[32] and (2) that a determination of whether to certify a class under Rule 23 is as much a substantive ruling as a procedural one.[33] But these holdings like the proverbial "house built upon sand" lack a strong foundation.[34]

First, the cases cited above by Petitioners do not base their holdings upon actual substantive or procedural distinctions in the language of the respective rules of civil procedure but upon the right of a state court to have the discretion to construe and apply its rules in a different manner with a different

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[31] *Chick Kam Choo.*, 486 U.S. at 148-49 (emphases added).

[32] *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 721-22 ; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 at * 3. Appen. at 7a; 25a.

[33] *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 722-24; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 at ** 3-4. Appen. at 8a-11a; 25a-27a. *Accord Bridgstone/Firestone*, 333 F.3d at 768 ("Determining the permissible scope of litigation is as much substantive as it is procedural.").

[34] *Matthew* 7:24-27.

result.[35] As explained by Petitioners to both the district court and the Eighth Circuit, the fact that the West Virginia Supreme Court of Appeals applies its version of Rule 23 in a manner different from its federal counterparts is readily demonstrated by merely contrasting the decisions in the Rezulin MDL proceedings, *In re Rezulin Products Liability Litigation*,[36] as well as the District Court's own decision in *McCollins*,[37] both applying Fed.R.Civ.P. 23 to deny class certification of an economic-loss claim based on breach of express and implied warranties and violation of the WVCCPA involving pharmaceutical products, with the West Virginia Supreme Court of Appeals' decision in *In re West Virignia Rezulin*

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[35] *See J R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d at 180 ("a Texas court might well exercise this discretion in a different manner. It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court-or at least each jurisdiction-be free to make its own determination in this regard"); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146 ("[O]ur construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23"); *Allen v. Stewart Title Guar. Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 ("a Pennsylvania court may exercise its discretion regarding class certification in a different manner than a federal court").

[36] 210 F.R.D. 61 (S.D.N.Y 2002).

[37] *In re Baycol Prods. Litig., McCollins v. Bayer Corp.*, MDL NO. 1431, No. 02-0199, ___ F.R.D. ___, 2008 WL 7416660 (D.Minn. Aug. 25, 2008) (Davis, C.J.). Appen. at 35a-52a.

Litigation,[38] reversing a trial court's denial of such a class certification under W.Va.R.Civ.P. 23.[39]

Indeed, before beginning its analysis in *In re West Virignia Rezulin Litigation*, the West Virginia Supreme Court of Appeals cautioned:

> The circuit court, in its order denying class certification, appears to have relied almost exclusively on federal cases interpreting Rule 23 of the Federal Rules of Civil Procedure-and denying class certification-in drug or medical device actions. As we made clear . . . "[a] federal case interpreting a federal counterpart to a West Virginia rule of procedure may be

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[38] 585 S.E.2d 52 (W.Va. 2003).

[39] The Eighth Circuit's attempt to refute this argument by contending that the district court's decision in *McCollins* (i.e., that common issues did not predominate on questions of causation) was based on different grounds than the West Virginia Supreme Court of Appeals' decision in *In re West Virignia Rezulin Litigation* (i.e., that common issues did predominate on questions of damages) is largely a distinction without significance. *See In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 723 n. 4.; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02-0199, 2008 WL 7425712 at * 3. Appen. at 10a n.4; 25a. Appellants' counsel were lead counsel in *In re West Virginia Rezulin Litigation* and as officers of the Court can assure this Court that the defendants argued and the trial court held in that case that individual issues predominated over common issues on all questions of liability, causation, and damages. All this Court need do to verify this point is read the West Virginia Circuit Court's decision, *In re West Virginia Rezulin Litigation*, No Civ.A. 00-C-1180-H, 2001 WL 1818442 (W.Va.Cir.Ct., Raleigh County, Dec. 13, 2001) (Hutchison, J.), which was reversed by the West Virginia Supreme Court of Appeals.

> persuasive, but it is not binding or controlling." Our reasoning for this rule is to avoid having our legal analysis of our *Rules* "amount to nothing more than Pavlovian responses to federal decisional law." . . .[40]

Second, the fact that a court must be aware of the elements of substantive state-law claims in order to conduct its determination of the "common question" and "predominance" prongs of a Rule 23 analysis does not transform the analysis from a procedural ruling to a substantive one. This Court has consistently held that a party's "right to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."[41] Accordingly, this Court has explained that it "view[s] the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment."[42]

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[40] *In re West Virginia Rezulin Litig.*, 585 S.E.2d at 61 (citations omitted).

[41] *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). *See also United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) (explaining that a plaintiff who seeks class certification presents two separate issues for judicial resolution, one being the claim on the merits and the other being the procedural claim that he is entitled to represent a class); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (noting that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)."); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (same).

[42] *Roper*, 445 U.S. at 336.

The Court has also expressly held that a court in conducting a Rule 23 analysis should not make rulings on the merits of substantive claims: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[43] There can be no doubt that a Rule 23 determination is a "rigorous analysis"[44] that "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[45] But the complex nature of the analysis does not alter the procedural nature of the Rule 23 determination[46] or

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[43] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

[44] *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

[45] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

[46] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, ___ U.S. ____, 2010 WL 1222272, at **8-10 (March 31, 2010) (discussing procedural nature of Rule 23 and its compliance with Rules Enabling Act, 28 U.S.C. § 2072(a)).

permit a court to resolve on the merits the substantive claims of a plaintiff.[47]

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[47] *See* Fed.R.Civ.P. 23 advisory committee's note to 2003 amendments ("Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense, it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis."); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) ("Class certification hearings should not be mini-trials on the merits of the class or individual claims. ... At the same time, however, '[g]oing beyond the pleadings is necessary, as the court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" (internal citations omitted)); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (2004) ("The analysis of Rule 23 must focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental. The findings made for resolving a class action certification motion serve the court *only* in its determination of whether the requirements of Rule 23 have been demonstrated. . . . The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any facts differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment."); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) ("While it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, ... this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." (internal citation omitted)).

II. The Eighth Circuit's Opinion Conflicts With Decisions Holding That An Injunction Cannot Be Issued Under The Relitigation Exception To The Anti-Injunction Act When The District Court Lacks Personal Jurisdiction Over The State-Court Litigants Who As Absent Class Members Were Not Parties To The Prior Federal Proceeding That Resulted In Denial Of Class Certification And Were Never Afforded The Due-Process Protections Provided To Absent Members Of A Class When Class Certification Is Granted.

This Court has consistently recognized the time-honored principle that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. As explained by this Court:

> [A] person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against *the "deep-rooted historic tradition that everyone should have his own day in court." Richards [v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996)] (internal quotation marks omitted). Indicating the strength of that tradition, we have often repeated the general rule that *"one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of*

> *process." Hansberry [v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed.2d 22 (1940)]. *See also, e.g., Richards*, 517 U.S., at 798, 116 S.Ct. 1761; *Martin v. Wilks*, 490 U.S. 755, 761, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). . . .[48]

Accordingly, "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party."[49]

In *Philips Petroleum*, this Court explained the procedural due-process protections owed absent plaintiffs:

> In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated,

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[48] *Taylor v. Sturgell*, 128 S.Ct. at 2171 (emphases added).

[49] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (also noting, at 807, "a chose in action is a constitutionally recognized property interest possessed by each of the [absent class-action] plaintiffs").

> under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. . . .[50]

In recognition of these principles, at least two United States Circuit Courts of Appeals[51] have refused to recognize the existence of personal jurisdiction over absent members of a class–the certification of which had been denied–for purposes of enjoining or estopping the absent members from seeking class certification in another court. As explained by the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*:

> But here, in the wake of our judgment in *GM I*, there is no class pending before the MDL court, and thus, virtually none of the 5.7 million class members in Louisiana are before this Court in any respect, and there is no basis upon which

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[50] *Phillips Petroleum*, 472 U.S. at 811-12 (citations omitted).

[51] *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 141; *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d at 1245.

> we can infer their consent. . . . To be more precise, the Louisiana class members are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not, as far as has been demonstrated, have minimum contacts with Pennsylvania. Therefore, *due process deprives us of personal jurisdiction and prevents us from issuing the injunction* prayed for by appellants.[52]

The Eleventh Circuit has similarly held in *In re Bayshore Ford Trucks Sales, Inc.*:[53]

> Here, the district court refused to grant class certification in the Bayshore Action . . . *Once this decision was made, Westgate became a stranger to the Bayshore Action. . . . The denial of class certification limited the court's in*

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[52] 134 F.3d at 141 (emphasis added; footnote omitted).

[53] Any attempt to distinguish *Bayshore* from this case because class certification had been denied in *Bayshore* due to inadequate representation is a red herring. While it is true that inadequate representation was the reason for denial of class certification in *Bayshore*, there is no language in that opinion indicating that its decision regarding a lack of personal jurisdiction over the absent class members would have been different if class certification had been denied for any other reason. Furthermore, it must be stressed in this case that the district court never made an express finding of adequate representation in its decision denying class certification in *McCollins*. The district court should not be permitted to make a *post hoc* judgment as to such a critical issue. *See Chick Kam Choo*, 486 U.S. at 148. (cautioning that a district court is not permitted to render a *post hoc* judgment as to what an earlier order should have said).

> *personam jurisdiction solely to the parties appearing before it*, namely the Bayshore Dealers and Ford. Consequently, the denial could not have been binding on Westgate.[54]

In an effort to argue that the Petitioners should be treated the same as the plaintiffs who brought the *McCollins* case (or their privities) and that Petitioners have been accorded all necessary due-process protections, the Eighth Circuit has adopted the reasoning of the Seventh Circuit in *In re Bridgestone/Firestone*, *supra*. In *Bridgestone/Firestone*, the court held that its prior reversal of the certification of a nationwide-class action[55] could not be used to estop and enjoin absent members of the class from seeking certification of statewide classes in state courts.[56] But the court then held that absent members of the class could be estopped or enjoined under the relitigation exception of the Anti-Injunction Act from seeking certification of nationwide classes of the same claims in state courts; provided that the absent members were adequately represented by the named litigants and class counsel.[57]

The reasoning of this latter holding of the Seventh Circuit in *Bridgestone/Firestone* is unpersuasive, and

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[54] 471 F.3d at 1245 (emphases added; citation and footnote omitted).

[55] *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

[56] *Bridgestone/Firestone*, 333 F.3d at 766.

[57] *Ibid.*, 333 F.3d at 766 69.

the Eighth Circuit's reliance upon it in this case is misplaced. The Seventh Circuit largely justified its holding on the basis that "unnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them."[58] In support of this proposition, the Seventh Circuit cited two decisions of this Court, *Devlin v. Scardelletti*;[59] and *Phillips Petroleum*, *supra*.

Because this Court acknowledged in *Devlin* that "[n]onnamed class members . . . may be parties for some reasons and not for others" and that they have the right to appeal certain class decisions without first intervening to obtain party status,[60] the Seventh Circuit reasoned that any absent class members could have sought a writ of certiorari from its adverse ruling denying class certification and, therefore, should be bound by the ruling.[61] The Seventh Circuit reasoned that any other approach would result in a "heads-I-win, tails-you-lose situation."[62] While this reasoning may be sound in cases where class certification is granted and the absent class members have been given notice of the class action and declined their right to opt

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[58] *Id.*, 333 F.3d at 768.

[59] 536 U.S. 1 (2002).

[60] *Devlin*, 536 U.S. at 7-10.

[61] *Bridgestone/Firestone*, 333 F.3d at 768.

[62] *Id.*, 333 F.3d at 767. The Eighth Circuit adopted that reasoning in this case. *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 723-24; Appen. at 11a.

out, it makes entirely no sense in cases were class certification has been denied and no notice has ever been provided to the absent members.

How are citizens in West Virginia suppose to even know that there is a case seeking certification of a West Virginia class in a district court in Minnesota if they are never accorded notice? And, if they have no knowledge of that case even existing, let alone of any rulings therein, how are they suppose to exercise their option of seeking a writ of certiorari concerning any adverse rulings? In that situation, any right or ability to seek review is purely imaginary. Under those circumstances, an absent member of the class is not being prevented from getting the proverbial, prohibited "two bites at the apple" but is being robbed of his entitlement to a single bite. Nothing in *Devlin*, supports that draconian result or otherwise states that absent class members are considered parties or their privities in cases where class certification is denied and the absent class members accordingly are never even accorded notice.

The fact that this Court in *Phillips Petroleum* ruled that absent class members are not entitled to the full panoply of due-process rights accorded defendants does not detract from the importance of those minimum rights to which they are entitled. The significance of the right to receive notice, the right to appear, the right to opt out, and the right to be adequately represented that are afforded class members upon certification of a class cannot be understated.[63]

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[63] *See Phillips Petroleum*, 472 U.S. at 811-12.

Rather than recognizing the significance of the above principles and the inherent unfairness in treating absent members of a class the same regardless of whether class certification had been denied or granted, the Seventh Circuit essentially ignored the inequity of the above harsh realities and simply held that its ruling was not affected by the fact that such absent class members had never received notice or the right to opt out because such rights do not accrue unless certification is granted.[64]

This Court's recent holding in *Taylor v. Sturgell*, *supra*, supports Petitoners' position and sheds light upon the Seventh Circuit's error. After reemphasizing the importance of the principles that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by designation or service of process, this Court *ac*knowledged that "the rule against nonparty preclusion is subject to exceptions" and that "[r]epresentative suits with preclusive effect on non parties include *properly conducted class actions* . . . ."[65] The Court then distinguished the broad doctrine of virtual representation from the recognized exceptions to the rule against nonparty preclusion, specifying that "[i]n the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."[66]

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[64] *Bridgestone/Firestone*, 333 F.3d at 769.

[65] *Taylor*, 128 S.Ct. at 2172 (citing *Martin*, 490 U.S. at 762 n. 2; Fed.R.Civ.P.23) (emphasis added).

[66] *Ibid.*, 128 S.Ct. at 2176.

As discussed above, these procedural safeguards are only afforded class members upon certification of a class.[67] A properly conducted class action cannot exist unless and until class certification is granted in accordance with the standards set forth in Rule 23. Until that point, all that exists is an individual lawsuit with a plaintiff seeking class-action status and appointment as a class representative. Upon denial of class certification, all that remains is the individual lawsuit.

The Court of Appeal for the Second District of California has recently recognized this exact point[68] in *Johnson v. GlaxoSmithKline, Inc.*:[69]

> Emphasizing its rejection of a notion of virtual representation that authorizes preclusion based on identity of interests and some kind of relationship between parties and non-parties "shorn of the procedural protections prescribed" in the class action rules, the [United States Supreme] Court [in *Taylor*] noted those protections are "grounded in due process." [*Taylor v. Sturgell*, 128 S.Ct. at 2176.]
>
> *The protections for absent class members prescribed by rule 23, of course, are afforded*

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[67] *See* Fed.R.Civ.P. 23; *Phillips Petroleum*, 472 U.S. at 811-12.

[68] Petitioners recognize that the relevant discussion of the court in *Johnson* is technically *dicta* since the court did not rely upon it in reaching its holding. But Petitioners submit that its discussion is nonetheless well-reasoned and persuasive.

[69] 83 Cal.Rptr.3d 607 (Ct.App.2nd Dist. 2008).

> *after a motion for class certification has been granted, not by the filing of a motion for certification that is denied. Similarly, the concept of a "properly conducted class action" suggests a class action that has been certified,* following a hearing in which the named representatives have established they satisfy the requirements of rule 23, and then litigated to judgment or settled, *not a individual lawsuit in which a motion for class certification was denied.* Literally (and narrowly) read, therefore, *Taylor v. Sturgell, supra,* ___ U.S. ____, 128 S.Ct. 2161 *would appear to preclude the use of collateral estoppel to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit . . . .*[70]

Additionally, any attempt to argue that absent members of a class do not suffer any real harm by being deprived of the opportunity to seek certification of a statewide class in state court because they still have the right to proceed with their own individual lawsuit[71] also entirely misses the mark. This Court has recognized that the primary, beneficent purpose of Rule 23 is "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'" due to the small monetary sums at issue as damages for each

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[70] 83 Cal.Rptr.3d at 618 n. 8 (emphases added).

[71] *See Bridgestone/Firestone*, 333 F.3d at 769; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 725-26; *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, MDL 1431, No. 02 0199, 2008 WL 7425712 at * 6. Appen. at 14a-15a; 31a.

individual.[72] If deprived of the opportunity to seek class certification, Petitioners will suffer irreparable harm because they will deprived of any effective means by which to seek redress for their damages.

Interestingly, the alleged irreparable harm that Bayer Corporation will be required to endure if Petitioners prevail is that of being forced to deal with the repetitious litigation of defending the West Virginia class action. But what presents the greatest threat of repetitious litigation and potential inconsistent judgments: dealing with one West Virginia class action or thousands of individual lawsuits brought in courts across all of West Virginia? While the answer appears obvious, sadly Bayer Corporation knows that those thousands of individual lawsuits can never economically and efficiently be brought due to the small amount of individual damages at issue.

Lastly, it should be noted that the Eighth Circuit asserts that its decision is justified because of the special circumstances and responsibilities of an MDL court.[73] While there is no question that an MDL court has great responsibilities and should have sufficient discretion and flexibility to meet them,[74] it is an

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[72] *Amchem Prods., Inc.*, 521 U.S. at 617 (quoting Kaplan, Prefatory Note 497).

[73] *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d at 724 & 726. Appen. at 12a & 17a.

[74] Petitioners are aware of some courts using the "necessary in aid of its jursidction" exception to the Anti-Injunction Act in order to protect an MDL court's settlement class. *See, e.g., In re General*

entirely different proposition to submit that an MDL court should be able to disregard due-process protections, ignore personal-jurisdiction requirements, and only pay lip-service to the elements of the doctrine of collateral estoppel in order to meet the relitigation exception to the Anti-Injunction Act–an exception that is to be narrowly construed in preference of permitting state-court litigation to proceed without interruption. No rule of law or exception should exist or be created to advance a proposition that is both untenable and that would result in a miscarriage of justice.

PRAYER FOR RELIEF

Petitioners respectfully pray that Your Honorable Court grant their Petition for Writ of Certiorari and reverse the opinion and judgment of the Eighth Circuit Court of Appeals. The Petition for Writ of Certiorari should be granted because, as previously explained, the Eighth Circuit's decision creates and/or adds to conflicts between Circuit Courts of Appeal on the important questions of (1) whether a district court can utilize the doctrine of collateral estoppel under the relitigation exception of the Anti-Injunction Act in order to estop and enjoin plaintiffs in state court from seeking certification of a statewide class under the state's procedural rules when the district court had previously denied certification of a similar, statewide class under federal procedural rules; and (2) whether a district court has personal jurisdiction over absent members of a once-proposed class–who never were

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Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 134 F.3d at 144-45. But such exception was neither advanced in this case nor are the reasons for its invocation present.

afforded the due-process protections owed to class members in properly conducted class actions because of the court's denial of class certification–so as to permit it to estop and enjoin them from seeking class certification in state court.[75]

Additionally, the decision of the Eighth Circuit also conflicts, at least indirectly, with two decisions of this Court that respectively hold (1) that the relitigation exception to the Anti-Injunction Act cannot be employed to enjoin consideration of the issue of whether a state court's procedural rules will grant litigants access to its courts on the basis that a federal court had denied access to such litigants on the basis of its own procedural rules; and (2) that a properly conducted class action is an exception to the rule against preclusion of nonparties because of the procedural due-process safeguards provided to absent class members upon class certification being granted.[76]

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[75] *See* Sup. Ct. R. 10(a).

[76] *See* Sup. Ct. R. 10(c).

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-1069

[Filed January 5, 2010]

In re: Baycol Products Litigation,	)
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Peggy Ann Mays; George F. McCollins, individually, and on behalf of all others similarly situated,	)
	)
Plaintiffs,	)
	)
Keith Smith; Shirley Sperlazza,	)
	)
Respondents-Appellants,	)
	)
v.	)
	)
Bayer Corporation, a foreign corporation, authorized to do business in West Virginia as Bayer Corporation, and also known as Bayer AG and Bayer Pharmaceutical,	)
	)
Defendant-Appellee,	)
	)
Bayer AG, a foreign corporation; GlaxoSmithKline, Inc., a foreign	)

corporation; SmithKline Beecham)
Corporation; GlaxoSmithKline PLC,)
)
Defendants.)
)

Appeal from the United States
District Court for the District of Minnesota.

Submitted: November 17, 2009
Filed: January 5, 2010

Before MURPHY, SMITH, and BENTON, Circuit Judges.

MURPHY, Circuit Judge.

Plaintiff George McCollins represented a putative West Virginia class in this multidistrict litigation against the defendants who manufactured and produced Baycol, a prescription cholesterol lowering medication. His was one of thousands of similar Baycol lawsuits consolidated for pretrial proceedings in the district court, In re Baycol Prods. Litig., MDL No. 1431. After the presiding judge[1] denied certification of the class McCollins sought to represent, two other former Baycol users from West Virginia, Keith Smith and Shirley Sperlazza, sought to certify a class in West Virginia state court. Defendant Bayer Corporation brought a motion in this case for the district court to enjoin Smith and Sperlazza from relitigating in state court the certification of a West Virginia class. Smith

[1] The Honorable Michael J. Davis, Chief Judge, United States District Court for the District of Minnesota.

and Sperlazza responded by special appearance in opposition to the motion for injunctive relief. The district court granted the injunction, and respondents appeal. We affirm.

I.

Baycol was distributed from 1997 until August 2001, when the drug was withdrawn from the market after its use was linked to thirty one deaths in the United States. In re Baycol Prods. Litig., 532 F.Supp.2d 1029, 1035 (D.Minn. 2007). Tens of thousands of former Baycol users have filed suit since the drug was withdrawn. The Judicial Panel on Multidistrict Litigation, see 28 U.S.C. § 1407, consolidated the federal cases in the district court for pretrial proceedings.

In August 2001, McCollins and two others initiated their putative class action in West Virginia state court. Defendants removed the case to federal court on diversity grounds, and it was subsequently transferred to the multidistrict court. By 2008 McCollins was the only remaining class representative. He had not experienced the side effect that led to Baycol's withdrawal from the market; undisputed record evidence showed that he had physically benefitted from the drug. Rather than suing for physical damages, he sought refunds for economic loss caused by the defendants' breach of warranties and violation of the West Virginia Consumer Credit and Protection Act (WVCCPA), W.Va. Code § 46A-6-101.

Respondents Smith and Sperlazza, purporting to represent a similar class with similar allegations, brought their case in West Virginia state court in

September 2001. Since the one year statute of limitations on removal had run by the time complete diversity existed, see 28 U.S.C. § 1446, respondents remained in state court. Had their case been filed a few years later, defendants could have removed it pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

The multidistrict (MDL) district court has issued over 160 pretrial orders and engaged in extensive efforts to coordinate its proceedings with state courts handling Baycol cases. In 2002, the Plaintiffs' Steering Committee filed a Master Class Action Complaint and subsequently moved for certification of, among other classes, a nationwide refund class. In re Baycol Prods. Litig., 218 F.R.D. 197, 202 (D.Minn. 2003). The district court denied the motion, concluding that since such plaintiffs "would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any health benefits[,]" common issues did not predominate pursuant to Fed.R.Civ.P. 23(b)(3) and (c)(4). Id. at 213-14. A further barrier to class certification, the district court concluded, was the lack of uniformity among state tort laws governing unjust enrichment and breach of warranty. Id. at 214.

Defendants subsequently moved the district court to deny class certification of the West Virginia economic class proposed by McCollins,[2] and to enter

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[2] McCollins characterized the defendants' motion as a motion to strike under Fed.R.Civ.P. 12(f), since the specific relief they requested was for "Plaintiff's Class Allegations [to] Be Stricken as a Matter of Law." The district court and the parties in this appeal considered the motion as one to deny class certification. See Vinole

summary judgment against McCollins on his individual claims. The district court granted the defendants' motions on August 25, 2008, after concluding that nothing in West Virginia law would alter its prior analysis that individual issues of fact predominate with regard to economic loss claims. In re Baycol Prods. Litig., McCollins v. Bayer Corp., et al., MDL No. 1431, No. 02-0199, slip op. at 11-12 (D. Minn. Aug. 25, 2008) (Order Denying Certification). Holding that under the WVCCPA, McCollins would need to "demonstrate Baycol was something other than what he bargained for" and that McCollins could not meet this burden since Baycol in fact lowered his cholesterol and resulted in no side effects, id. at 18, the court also granted summary judgment to the defendants on his individual claims. Id. at 19. No part of the order was appealed.

Shortly after the deadline expired to appeal the order denying certification, respondents moved for certification of a West Virginia economic loss class in state court. Bayer moved the district court to enjoin respondents, as absent putative class members in this case, from relitigating the previous decision denying certification of a West Virginia economic loss class. Respondents specially appeared before the district court in this case to object to the motion for an injunction. The district court granted an injunction, and respondents filed this appeal.

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v. Countrywide Home Loans, Inc., 571 F.3d 935, 939-40 (9th Cir. 2009) (Rule 23 allows defendants to move preemptively to deny class certification prior to plaintiffs' moving for certification).

II.

Although the Anti-Injunction Act generally prohibits federal courts from interfering in state proceedings, it permits injunctions necessary to "protect or effectuate its judgments." 28 U.S.C. § 2283; see also All Writs Act, 28 U.S.C. § 1651 (providing statutory authority to issue injunction when justified). We review de novo the district court's determination that the Act's "relitigation exception" applies, Jones v. St. Paul Cos., Inc., 495 F.3d 888, 890 (8th Cir. 2007), and that it had personal jurisdiction over respondents, Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072 (8th Cir. 2004).

"Because of the sensitive nature of federal interference with state court litigation," the relitigation exception "must be narrowly construed." Jones, 495 F.3d at 891. The district court's injunction was proper if collateral estoppel would bar respondents from seeking certification of a West Virginia economic loss class in state court. See Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988) (relitigation exception "founded in the well-recognized concepts of *res judicata* and collateral estoppel").

In determining the preclusive effect of the order denying certification, we rely on federal common law. See Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) (federal common law governs the preclusive effect of a dismissal in a diversity case); In re Bridgestone/Firestone, 333 F.3d 763, 767-68 (7th Cir. 2003) (applying federal law to determine the preclusive effect of a federal court's denial of class certification). We usually incorporate the collateral estoppel doctrine of the relevant state unless it is

"incompatible with federal interests[,]" in which case "a contrary federal rule" may be justified. Semtek, 531 U.S. at 509.

We begin by considering the West Virginia collateral estoppel requirements:

> (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

State v. Miller, 459 S.E.2d 114, 120 (W.Va. 1995).

The issue presented by respondents' motion in state court for class certification was previously decided by the district court in this case. Respondents seek certification on the same legal basis of the same class already denied in this case. Respondents argue that the issues are different because the district court applied Fed.R.Civ.P. 23 while they moved for certification in state court under W.Va.R.Civ.P. 23. Respondents point to no relevant substantive or procedural differences between the two certification rules, however.

In order to reach the question of class certification, the district court appropriately decided a substantive issue of West Virginia law as to what a former Baycol user suing Bayer must prove under the WVCCPA. The district court determined that a plaintiff must show

that Baycol injured or did not benefit him through an "in depth review of [his] medical records[.]" Order Denying Certification, slip op. at 12. In other words, the district court concluded that Baycol plaintiffs cannot state a claim under the WVCCPA without proof of harm or injury. Economic loss alone is insufficient. Certification under the state rule would undermine this conclusion of substantive state law properly made by the district court. See Canady v. Allstate Ins. Co., 282 F.3d 1005, 1018 (8th Cir. 2002) ("[A]ppellants may not . . . recycle the same claims and issues in different courts, hoping to achieve the result they desire.").[3]

Though technically a procedural ruling, a certification determination "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (quotation omitted). Under federal rule 23(b)(3), common issues of fact or law must predominate over individual issues. A judge must delineate what issues of law exist to determine whether they are common to the class. See Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005) (disputes "going to the factual setting of the case" and "overlap[ping] with the merits" may be resolved in a certification decision "[as] necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case"); see also In

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[3] We acknowledge that some parts of Canady have been overruled. See Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 821-22 (8th Cir. 2009) (theory that the All Writs Act provides an independent grant of subject matter jurisdiction abrogated by Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002)).

re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006). Recognizing this phenomenon, federal courts sometimes apply a de novo standard of review to legal determinations made in the course of deciding whether or not to certify a class despite the overall abuse of discretion standard applicable to certification rulings. See, e.g., Yokoyama v. Midland Nat. Life Ins. Co., --- F.3d ----, No. 07-16825, 2009 WL 2634770, at *3 (9th Cir. Aug. 28, 2009); Andrews v. Chevy Chase Bank, 545 F.3d 570, 573 (7th Cir. 2008).

Respondents' argument that In re W. Va. Rezulin Litig., 585 S.E.2d 52 (W.Va. 2003), indicates that a West Virginia court might apply its own certification rule differently thus misses the point. In that litigation involving a diabetes drug, the West Virginia Supreme Court of Appeals reversed the denial of class certification for former Rezulin users who sought a refund as well as medical monitoring costs. The court recognized that a "conclusion on the issue of predominance [in a certification decision] requires an evaluation of the legal issues and the proof needed to establish them." Id. at 72 (quotation omitted). The state appellate court concluded that common issues predominated based on (1) its interpretation of medical monitoring claims under its decision in Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W.Va. 1999), and (2) its determination that a prima facie WVCCPA case does not require a plaintiff to allege specific damages but only to show that "she has purchased an item that is different from or inferior to that for which he bargained[.]" In re W. Va. Rezulin Litig., 585 S.E.2d at 73-75. These were substantive legal determinations necessary to support its conclusion that certification was appropriate in that litigation.

Likewise, the district court reached its certification decision in this case based on its own "evaluation of the legal issues and the proof needed to establish them[,]" namely its determination that all Baycol plaintiffs will need to show an individualized physical injury.[4] This conclusion has a preclusive effect and is inseparable from the certification question.[5] That respondents may disagree with the district court's legal conclusions about the WVCCPA is unavailing. See Liberty Mut. Ins. Co. v. FAG Bearings Corp., 335 F.3d 752, 763 (8th Cir. 2003) (application of collateral estoppel not dependent on correctness of prior decision).

The issues here are also distinguishable from those in Chick Kam Choo, where the Supreme Court considered the preclusive effect of a federal court's application of forum non conveniens. 486 U.S. at 149. Since the original federal decision there had discussed only federal forum non conveniens principles, its injunction preventing consideration of whether Texas state courts were an appropriate forum was "not

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[4] In addition, the district court observed that the West Virginia court based its Rezulin decision on its "reject[ion of] the argument that individual issues of damages predominated[,]" while here "individual issues of causation, not damages, predominated over common issues." In re Baycol Prods. Litig., McCollins v. Bayer Corp., et al., MDL No. 1431, No. 02-0199, slip op. at 7 (D.Minn. Dec. 9, 2008) (Order Granting Injunction).

[5] The putative McCollins class asserted breach of warranty and WVCCPA claims too, while respondents also alleged a common law fraud claim. The addition of a fraud claim does not change our analysis. "The same cause of action framed in terms of a new legal theory is still the same cause of action[.]" Canady, 282 F.3d at 1015.

within the relitigation exception." Id. A forum non conveniens determination is different from what is at issue here, for class certification is often entwined with substantive conclusions of state law.[6] See Bridgestone/Firestone, 333 F.3d at 768 ("Determining the permissible scope of litigation is as much substantive as it is procedural."). In addition, Texas had an "open-courts" concept substantively different from the forum non conveniens analysis applied in federal court. Chick Kam Choo, 486 U.S. at 148-49. The state and federal certification rules here, by contrast, are not significantly different. Compare W.Va.R.Civ.P. 23 with Fed.R.Civ.P. 23.

Our holding today comports with the reasoning of Bridgestone/Firestone, in which the Seventh Circuit concluded that the relitigation exception permitted an injunction barring relitigation in state court of a federal court's denial of class certification. 333 F.3d at 769. The Bridgestone/Firestone plaintiffs sought national class certification in various state courts after it had been denied in federal court. Relitigation in state court of whether to certify the same class rejected by a federal court presented an impermissible "heads-I-win, tails-you-lose situation." Id. at 767. We agree.

The Bridgestone/Firestone court also reasoned that to the extent that the plaintiffs sought to "urge state courts to disregard [its earlier] judgment" on a state

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[6] This is not always the case. See, e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) (prior decision reversing certification of a settlement class on grounds unrelated to substantive conclusions of state law did not preclude a state court from subsequently certifying a settlement class according to its own procedural rule).

collateral estoppel principle of finality, "that course is cut off by Semtek's proviso[,]" namely that "state rules that undermine the finality of federal judgments are not incorporated." Id. at 767-68; Semtek, 531 U.S. at 509. Likewise, if a West Virginia estoppel principle would undermine the federal interest in "protect[ing] or effectuat[ing a federal court's] judgment[,]" 28 U.S.C. § 2283, a contrary rule under federal common law is permissible.

We conclude that in the context of MDL proceedings, certification in a state court of the same class under the same legal theories previously rejected by the federal district court presents an issue sufficiently identical to warrant preclusion under federal common law.[7] We have previously recognized that "administering cases in multidistrict litigation is different from administering cases on a routine docket" and that "MDL courts must be given greater discretion to organize, coordinate and adjudicate its [sic] proceedings[.]" In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 496 F.3d 863, 867 (8th Cir. 2007) (quotation omitted).

Respondents do not dispute that the next collateral estoppel requirement, finality of the prior judgment, is met. The district court's order was a final judgment disposing of McCollins' individual claims and the class

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[7] This situation is distinguishable from the non MDL class action in J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 180 (5th Cir. 1996), where the Fifth Circuit observed that "each court–or at least each jurisdiction–[should] be free to make its own [certification] determination[,]" a comment not suited to the collateral estoppel principles of finality and uniformity which are particularly important in MDL proceedings.

allegations, and it was not appealed within the statutory period. See Fed.R.App.P. 4(a)(1)(A).

The third and fourth elements of collateral estoppel are entwined: that the parties against whom the rule is asserted are the same parties or parties in privity to those in the prior action and that their interests have been adequately represented. The Seventh Circuit concluded that the denial of class certification is binding on unnamed class members *because* they were adequately represented in the prior proceeding. *Bridgestone/Firestone*, 333 F.3d at 768-69. Rule 23(a)(4)'s adequacy requirement is met when the class representative is "part of the class and possess[es] the same interest and suffer[s] the same injury as the [absent] class members." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26 (1997) (quotations omitted). Here, the McCollins class and respondents' class are essentially the same. Both are West Virginians who purchased Baycol. Both classes rely on the same theory rejected by the district court: their ability to recover for economic loss despite the absence of a physical injury. Thus, respondents' interests were aligned with McCollins'.

Respondents argue that because the district court assumed without deciding that all 23(a) factors were met in denying class certification previously, its adequacy finding is a "*post hoc* judgment" not entitled to a preclusive effect. See Chick Kam Choo, 486 U.S. at 148. In prohibiting post hoc judgments in Chick Kam Choo, the Supreme Court clarified that injunctions must be limited to issues "actually" presented and decided by the federal court, as evidenced by "the state of the record[.]" Id. (quotation omitted). Adequacy was an "argument[] actually presented" to the district court

in the briefs, id., and "vigorously argued" by counsel. Order Granting Injunction, slip op. at 15.

Although respondents argue inadequacy based on McCollins' failure to appeal the denial of certification, adequacy of representation does not depend on whether the putative representative appealed. The point of the adequacy inquiry is "to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 625-26. Here, there were no conflicts of interest.

Finally, respondents argue that the court cannot assert personal jurisdiction over them absent notice and an opportunity to opt out of the previously proposed class or to participate in the litigation. These procedural due process requirements apply when absent class members will be bound to a judgment on the merits of their claims. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985); see also Taylor v. Sturgell, 128 S.Ct. 2161, 2167 (2008) (exempting properly conducted class actions from the general prohibition on "virtual representation"). In contrast, respondents are still free to pursue individual claims in state court. As the Seventh Circuit noted, "a person who opts out [of a certified class] receives the right to go it alone, not to launch a competing class action." Bridgestone/Firestone, 333 F.3d at 769. Just as unnamed members of a certified class can challenge the propriety of a settlement, respondents could also have sought to intervene pursuant to Fed.R.Civ.P. 24 to appeal the district court's denial of class certification. See United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977); see also Bridgestone/Firestone, 333 F.3d at 768.

The nature and degree of due process protections necessary to establish personal jurisdiction depends on context. See Keating v. Neb. Pub. Power Dist., 562 F.3d 923, 928 (8th Cir. 2009); see also Devlin v. Scardelletti, 536 U.S. 1, 9-10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others."). The protections available to respondents in the context of an adverse certification ruling include their right to adequate representation, their ability to appeal, and the fact that the decision still allows them to pursue their individual claims. These safeguards satisfy due process and are sufficient to bind them in personam to the district court's certification decision. Cf. In re Bayshore Ford Trucks Sales, Inc., 471 F.3d 1233, 1245 (11th Cir. 2006) (no personal jurisdiction over absent putative class member where the district court based denial of class certification on lack of adequate representation).[8] After all, respondents would have been included in a certified class in this case. "Just as they [would have] receive[d] the fruits of victory, so an adverse decision is conclusive against them." Bridgestone/Firestone, 333 F.3d at 768. As such, the court had personal jurisdiction over them.

Since Bayer filed in McCollins, we reject respondents' argument that the court lacked subject matter jurisdiction. Bayer did not seek to remove the respondents' *case* to federal court, see Syngenta, 537 U.S. at 31-34, but rather to enjoin them, absent

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[8] Contra Gen. Motors, 134 F.3d at 141 (requested injunction would have required federal court to exercise personal jurisdiction over 5.7 million class members who had already settled their claims in the state proceeding).

putative class members in this case, from relitigating certification.

III.

Even if all the collateral estoppel requirements are met,"an injunction must also be equitable in order for a federal court to issue it." Canady, 282 F.3d at 1020. We review the court's granting of a permissible injunction for an abuse of discretion. Liles v. Del Campo, 350 F.3d 742, 746 (8th Cir. 2003). The appropriateness of injunctive relief is based on several factors: "(1) the threat of irreparable harm to the movant; [sic] (2) the balance between this harm and the injury caused by granting the injunction, (3) the probability of succeeding on the merits, and (4) the public interest." Canady, 282 F.3d at 1020. We have previously held that relitigating in state court an issue previously decided in federal court constitutes irreparable harm, and that the inability to relitigate the issue is not "a legitimate harm which must be balanced" since the enjoined party "had one full and fair opportunity to litigate" it in federal court. In re SDDS, Inc., 97 F.3d 1030, 1041 (8th Cir. 1996).

Bayer has demonstrated success on the merits by showing that respondents cannot relitigate the legal conclusions in the McCollins order. Respondents argue that because their individual claims for damages are so small, as a practical matter they cannot litigate them without class status. They have no absolute right to litigate their claims as a class, however, only a right, preserved by the district court's narrowly tailored injunction, to litigate their own claims. "In addition, the public policy concerns of finality and repose informing our res judicata jurisprudence

strongly supports the protection of our previous judgment." In re SDDS, 97 F.3d at 1041. These are particularly compelling concerns in an MDL proceeding involving tens of thousands of plaintiffs.

In sum, the district court did not abuse its discretion or make errors of fact or law in issuing the injunction. Accordingly, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1069

[Filed January 5, 2010]

In re: Baycol Products Litigation,	)
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Peggy Ann Mays; George F. McCollins, individually, and on behalf of all others similarly situated,	)
	)
Plaintiffs,	)
	)
Keith Smith; Shirley Sperlazza,	)
	)
Respondents-Appellants,	)
	)
v.	)
	)
Bayer Corporation, a foreign corporation, authorized to do business in West Virginia as Bayer Corporation, and also known as Bayer AG and Bayer Pharmaceutical,	)
	)
Defendant-Appellee,	)
	)
Bayer AG, a foreign corporation; GlaxoSmithKline, Inc., a foreign corporation; SmithKline Beecham Corporation; GlaxoSmithKline PLC,	)
	)
Defendants.	)
	)

Appeal from U.S. District Court for the
District of Minnesota - Minneapolis
(0:02-cv-00199-MJD)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 05, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
Civil No. 02-199

[Filed December 9, 2008]

In re: Baycol Products Litigation	)
	)
This Document Relates to:	)
	)
Black, et al. v. Bayer Corp., et al.,	)
	)

MEMORANDUM OF LAW & ORDER

Marvin W. Masters, Esq, Charles M. Love, IV, Esq. and Richard A. Monahan, Esq., The Masters Law Firm lc, Counsel for Plaintiffs.

Philip S. Beck, Adam Hoeflich, Bartlit, Beck, Herman, Palenchar & Scott, LLP; Eugene A. Schoon, Susan A. Weber, James W. Mizgala, James R. M. Hennings, Jennifer A. Foster, Elizabeth M. Chiarello, and Paul J. Zidlicky, Sidley Austin, LLP; Richard K. Dandrea, Eckert, Seamens, Cherin & Mellott, LLC; Peter W. Sipkins, Dorsey & Whitney, LLP; Douglas R. Marvin, Williams & Connolly; Erik W. Legg, Farrell, Farrell & Farrell, PLLC and Joseph D. Piorkowski, Jr.,

The Piorkowski Law Firm, P.C., Counsel for Bayer Corporation.

This matter is before the Court upon Defendant Bayer Corporation's ("Bayer") Expedited Motion for a Permanent Injunction.

PROCEDURAL BACKGROUND

Plaintiff George McCollins, a West Virginia resident, and two other named plaintiffs, brought this suit on behalf of themselves and on behalf of a putative class of plaintiffs who "purchased Baycol as a cholesterol lowering product in West Virginia." (Compl. ¶ 1)[1]. Plaintiffs sought damages under West Virginia law for themselves and the putative class in the nature of a refund for economic loss allegedly caused by Bayer's breach of express and implied warranties and violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). The class was defined as "individuals who have at any time purchased Baycol in West Virginia from when Baycol was initially placed on the market in the United States until the present."

By Order dated August 24, 2008, this Court denied Plaintiffs' Motion for a Suggestion of Remand, and granted Bayer's Cross Motion to Deny Class Certification and to Enter Judgment. The determination to deny class certification was made, in part, on the finding that individual issues with respect to economic loss claims predominate, because a

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[1] The claims of the other two named plaintiffs have since been dismissed.

plaintiff would have to prove, under West Virginia law, that they were either injured by Baycol or that Baycol did not provide them any health benefits. (See Order [Doc. No. 54] at 11-12 (finding that under West Virginia law, a plaintiff must show an ascertainable loss in order to recover damages under the WVCCPA).)

In addition, the Court addressed the merits of the claims of the only remaining class representative, George McCollins. The Court determined that to recover for economic injury pursuant to West Virginia law, the plaintiff must show that he suffered an ascertainable loss because of Bayer's conduct in the marketing and sale of Baycol. (Id. at 17.) To show an ascertainable loss, the plaintiff would have to show that he purchased an item different from or inferior to that for which he bargained. (Id. (citing In re Rezulin Litig., 585 S.E.2d 52 (W. Va. 2003).) With respect to Mr. McCollins, the Court determined that as the evidence demonstrated that Baycol actually worked for him - that is it lowered his cholesterol levels to within normal ranges - Mr. McCollins' claims failed and judgment was entered in favor of Bayer.

In a separate putative class action filed in West Virginia in 2001, plaintiffs Keith Smith and Shirley Sperlazza sought certification of a class of "all West Virginia residents and others who have ingested Cerivistatin, sold under the trade name Baycol in West Virginia." (Keith Smith, et al. v. Bayer Corp., et al., No. 01-C-191 (Cir. Ct. Brooke Co., W. Va.).) The Smith plaintiffs originally sought damages for personal injury, medical monitoring and economic loss. The case remained in state court due to the presence to two local defendants, who have since been dismissed.

On September 30, 2008, the Smith plaintiffs filed a motion for class certification in West Virginia of an economic loss class. The motion seeks to certify a class of "all West Virginia residents who purchased the drug Baycol in West Virginia . . . with respect to their consumer protection act claims as set forth in the complaint." It is Bayer's contention that the economic loss class that the Smith plaintiffs seek to certify is identical to the economic loss class claimed in this action, for which this Court denied class certification.

MOTION FOR INJUNCTIVE RELIEF

A. All Writs Act

Pursuant to the All Writs Act, 28 U.S.C. § 1651, Bayer requests the Court to issue an Order enjoining the Smith plaintiffs from relitigating class certification with respect to economic loss claims arising under West Virginia law in order to effectuate this Court's previous order denying class certification in this case.

The All Writs Act empowers this Court to protect the res judicata and collateral estoppel effects of its prior judgments by enabling it to issue all writs necessary or appropriate in aid of its jurisdiction. Canady v. Allstate Ins. Co., 282 F.3d 1005, 1018 (8th Cir. 2002). This power allows the Court to issue an order enjoining relitigation of its judgment, even if the case in which the judgment issued is closed or on appeal. Id. The Court's power to enjoin relitigation extends to relitigation in state courts and in other forums, including arbitration. In Re Y & A Group Secs. Litig., 38 F.3d 380, 382 (8th Cir. 1994); Entergy, Ark., Inc. v. Nebraska, 210 F.3d 887 (8th Cir. 2000); Time Warner Cable, Inc. v. City of Minneapolis, No. 06-484,

2006 WL 1579941, at *5 (D. Minn. June 2, 2006) (Davis, C.J.).

The Anti-Injunction Act provides that a United States court cannot enjoin state proceedings, "except as expressly authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. § 2283.

Bayer asserts that this power extends to prevent the serial relitigation of class certification decisions. See In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 220-21 (8th Cir. 1977). Bayer asserts that courts have applied collateral estoppel to bar subsequent efforts to certify a putative class for which certification has already been denied. See e.g., Canady, 282 F.3d at 1017; In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 333 F.3d 763, 766-67 (7th Cir. 2003); In re Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112, 1115-19 (E.D. Va. 1985).

To determine whether the relitigation exception to the Anti-Injunction Act applies here, the Court must examine whether collateral estoppel bars reconsideration of the class certification determination. Collateral estoppel applies when the following criteria are met: 1) whether the issue previously decided was identical to the one presented in the action in question; 2) there is a final judgment on the merits in the previous action; 3) the party against whom collateral estoppel is invoked was a party or in privity with a party to the prior action; and 4) the party against whom collateral estoppel is invoked had a full and fair opportunity to litigate the issue in the prior action. State v. Miller, 194 W. Va. 3,

9, 459 S.E.2d 114, 120 (W. Va. 1995). Bayer argues these criteria are clearly met in this case.

1. Whether the issues are identical.

The parties do not dispute that the Smith action seeks certification of a class asserting claims for economic loss under West Virginia law that is the same as was asserted in this case.

The Smith plaintiffs do assert, however, that the issues are not identical as their motion will be argued pursuant to West Virginia's Rules of Civil Procedure, versus the Federal Rules of Civil Procedure that were applied in this case. The Smith plaintiffs argue that there is a fundamental difference between these rules, as evidenced by the fact that a West Virginia court found in In re Rezulin that economic claims like those asserted by the plaintiffs could properly be certified in a class action.

The Court finds that the Smith plaintiffs' reliance in In re Rezulin is misplaced. In In re Rezulin, the court rejected the argument that individual issues of damages predominated over common issues. In re Rezulin, 585 S.E.2d at 74-75. In this case, however, this Court held that individual issues of causation, not damages, predominated over common issues. In addition, the Smith plaintiffs have not pointed to any substantive or procedural differences between West Virginia's rule regarding class certification and the Federal Rules that would render this case outside the relitigation exception the Anti-Injunction Act.

The Court thus finds that the Smith plaintiffs are seeking a ruling on a substantive issue of law that is

different from the ruling made by this Court. Accordingly, the Court finds that the issues are identical for purposes of collateral estoppel.

2. Whether there is a final judgment on the merits in the previous action.

There can be no dispute that there is a final judgment on the merits in this action. This Court entered judgment in favor of Bayer in its August 24, 2008 Order, and the time for appeal has passed.

Acknowledging that final judgment was entered in this case, the Smith plaintiffs nonetheless argue that injunctive relief is not appropriate here. The Smith plaintiffs argue that an order refusing to certify a class is not, in and of itself a final judgment. Rather, it is collateral to the merits of the claims asserted. In support, the Smith plaintiffs cite to J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176 (5th Cir. 1996). In Ashland, the defendant had moved to enjoin class certification in state court, after class certification had already been denied in federal court. The district court had denied the motion, finding that its denial of class certification was not a final appealable order. Id. at 178. At the time this determination was made, final judgment had not been entered in the federal action. Id.

In affirming the district court, the Fifth Circuit determined that an order denying class certification is not a final judgment and is not appealable as a matter of right. Id. at 179. The court further held that denial of class certification is a procedural ruling, and that the decision to certify a class is left to the wide discretion of the trial court. Id. at 180. "It is our

considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court - or at least each jurisdiction - be free to make its own determination in this regard." Id. See also In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Litig., 134 F.3d 133 (3rd Cir. 1998) (citing Ashland with approval, and finding that decision decertifying a class because factual findings were not made did not constitute a final judgment on the merits of issue.)

Bayer responds that neither the Ashland or GM decisions apply here, as those cases stand for the general proposition that class certification decisions are generally matters of judicial discretion. However, class certification determinations, like the one made by the Court in this case, may involve procedural and substantive components. See In re Bridgestone, 333 F.3d at 768 (finding that "[d]etermining the permissible scope of litigation is as much substantive as it is procedural.") The Eighth Circuit decision in Canady, recognized this principle and provides support for Bayer's requested relief.

In Canady, a group of plaintiffs, minority homeowners, brought an action in federal court seeking federal class certification under Rule 23. Id. 282 F.3d at 1006. The class had alleged that defendant insurance companies had engaged in discriminatory redlining practices. The district court denied class certification, and the Eighth Circuit affirmed. Id. at 1010. Thereafter, the same group of plaintiffs filed related litigation in Missouri state court. One of the defendants had moved to enjoin the plaintiffs from relitigating in Missouri state courts issues that had already been determined in federal court. Id. The

district court granted the motion, and issued an order enjoining plaintiffs from prosecuting any action against any defendants based upon the same allegations as those raised in the prior federal action. Id.

In affirming the district court's decision, the Eighth Circuit held that "the relitigation exception [to the Anti-Injunction Act] may apply even if the merits of the case were never reached, provided that a critical issue concerning the case has been adjudicated properly." Id. at 1015. The court determined that even though the prior case did not decide the merits of the claims, but rather dismissed the case for lack of standing, the relitigation exception applied because the prior case did finally decide the standing issue, and because the standing issue was appealable. Id.

In this case, judgment on the merits had been entered, thus the determination denying class certification was appealable. In addition, the Order denying certification was based in part on the finding that as a matter of law, individual issues predominated because to succeed on their claims, each class member would have to prove an ascertainable loss. As the Smith plaintiffs' motion for class certification is premised on this same issue, collateral estoppel applies to prevent the plaintiffs from relitigating the issue in state court in the hopes that they will obtain a different result. This is precisely what collateral estoppel is meant to prevent. See Canady, 282 F.3d at 1018 ("Appellants may not file what is essentially the same action, albeit under different legal theories, in state court merely to obtain a more favorable result than the one already obtained in their first choice of forum."); In re Piper Aircraft,

551 F.2d at 219 (finding that "a plaintiff is not entitled to unlimited bites at the apple until he can convince a single district court that he qualifies as a class representative under Rule 23.")

Accordingly, the Court finds that the "final judgment" criteria has been met.

3. Whether the parties are the same, and whether the parties had a full and fair opportunity to litigate the issue.

Bayer asserts that the Smith plaintiffs are absent class members from the putative class in this case. The Smith plaintiffs argue, however, that they are appearing specially in this case, and that this Court does not have personal jurisdiction over them or the class they seek to represent.

First, the Smith plaintiffs argue that neither the Anti-Injunction Act nor the All Writs Act satisfy the jurisdictional prerequisites of subject matter jurisdiction and personal jurisdiction. With respect to the issue of subject matter jurisdiction, however, the Eighth Circuit held "[a]s long as the original lawsuit was properly brought in federal court, the federal court retains subject matter jurisdiction to remove any subsequent state law action to federal court for purposes of applying the All Writs Act." Canady 282 F.3d at 1013. See also, Bryan v. Bellsouth Comm., Inc., 492 F.3d 231, 236 (4th Cir. 2007). The case relied upon by the Smith plaintiffs, Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 31-34 (2002), held that the All Writs Act did not confer an independent basis for subject matter jurisdiction upon which to remove a state filed case to federal court. That is not at issue

here. Rather, the issue is whether this Court has subject matter jurisdiction to issue the requested injunction to enjoin relitigation of class certification in a state court.

With respect to personal jurisdiction, the Smith plaintiffs argue a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). The Smith plaintiffs further argue that other courts have refused to recognize personal jurisdiction over absent class members with respect to a decision denying class certification. For example, In re Bayshore Ford Trucks Sales, Inc., 471 F.3d 1233 (11th Cir. 2006), the court held that once the district court denied class certification on the basis that the named plaintiffs were not adequate representatives of the class, the absent class members became strangers to that action. Id. at 1245, n. 27 (citing In re Bridgestone/Firestone 333 F.3d at 768). See also, In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Litig., 134 F.3d 133 (3rd Cir. 1998) (finding that order denying class certification does not have preclusive effect where ruling was based on lack of factual findings).

Bayer requests the Court adopt the reasoning of the Seventh Circuit in In re Bridgestone, as did the court in Bayshore, that if the unnamed class members were adequately represented in the prior action in which class certification was denied, then the absent class members are bound by such determination.

In Bridgestone, the court held that absent class members are protected if they were adequately represented by the named litigants and class counsel.

Id at 768. As to the due process concerns raised by the determination that an absent class member may be bound by an order denying certification, the court noted that "no statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step." Id. at 769. Even if notice to opt out was provided, the opt out allows a class member to go it alone, "not to launch a competing class action." Id. Finally, the court noted that "[e]very person included in the district court's class definition still has the right to proceed on his own." Id.

The Smith plaintiffs urge this Court not to follow Bridgestone because this Court did not make an express finding that the named representatives and counsel in the prior action were adequate, rather the Court "assumed without deciding" that they were adequate representatives. (Order [Doc. No. 54] at 8.) While this is true, the Smith plaintiffs made no attempt to argue that Mr. McCollins' interests conflicted with their interests, or that counsel was inadequate, other than to assert that counsel did not appeal this Court's Order denying certification and granting summary judgment.

Counsel's decision not to appeal this Court's previous Order denying class certification does not, in and of itself, render his representation inadequate. See Brown v. Ticor Title Ins., Co., 982 F.2d 386, 390-391 (9th Cir. 1992) (must show that counsel "failed to prosecute or defend the action with due diligence and reasonable prudence"). Factors the Court would consider in determining the adequacy of counsel is whether counsel is "qualified, experienced, and generally able to conduct the proposed litigation." U.S. Fidelity & Guar. Co. v. Lord, 585 F.2d 860, 873 (8th Cir.

1978). Here, there has been no showing that counsel in this action was not qualified, experienced or able to conduct the proposed litigation. In fact, counsel for the McCollins plaintiffs asserted many of the same arguments in favor of class certification as counsel for the Smith plaintiffs raised in their pleadings before the West Virginia state court. (Compare Bayer Ex. F (Smith motion) and Ex. G (McCollins motion.) Nonetheless, the Court finds that counsel for the McCollins plaintiffs vigorously argued in favor of class certification before this Court. Accordingly, the McCollins plaintiffs were adequately represented.

Accordingly, the Court finds that it has personal jurisdiction over the Smith plaintiffs for purposes of a collateral estoppel determination. Thus, the Court finds that for purposes of determining the applicability of collateral estoppel, the parties are the same and the parties were given a full and fair opportunity to litigate the issue.

Because all four criteria used to determine the applicability of collateral estoppel are met here, the Court finds that the relitigation exception to the Anti-Injunction Act applies. The Court must now determine whether Bayer has demonstrated that it is entitled to the requested injunctive relief.

B. Permanent Injunction

Bayer argues that if the Court finds that the Anti-Injunction Act applies, that it has met its burden of establishing that it is entitled to the requested injunctive relief. See In re SDDS, Inc., 97 F.3d 1030, 1041 (8th Cir. 1996) (movant must consider Dataphase

factors prior to issuing injunctive relief under the Anti-Injunction Act).

Injunctions are extraordinary legal remedies and are granted sparingly. Greater Iowa Corp. v. McLendon, 378 F.2d 783, 799 (8th Cir. 1967). The party seeking a permanent injunction must show actual success on the merits. Vonage Holdings Corp. v. Minnesota Pub. Utilities Comm'n, 290 F. Supp.2d 993, 996 (D. Minn. 2003) (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987)). In addition, the Court should consider (1) the threat of irreparable harm to the moving party; (2) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (3) the public interest in the issuance of the injunction. Id. (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). "The party requesting injunctive relief bears the 'complete burden' of proving all the factors." Id. (citation omitted).

1. Success on the Merits

This factor has been met, as Bayer has demonstrated that the Court's prior Order denying class certification is entitled to preclusive effect.

2. Threat of Irreparable Harm

"[A] party suffers irreparable harm when it is required to relitigate . . issues previously decided in a federal court." Canady, 282 F.3d at 1020 (citing In re SDDS, Inc., 97 F.3d 1030, 1040 (8th Cir. 1996)). This factor thus weighs in favor of the requested injunctive relief.

3. Balance of Harms

The balance of harms also weighs in favor of the requested injunctive relief. "The deprivation of an opportunity to pursue the same issues in [another] forum does not constitute a legitimate harm." Id.

4. The Public Interest

The public interest is also served by the requested relief, as it will promote judicial economy and protection of the parties from harassing and duplicative litigation. In re SDDS, 97 F.3d at 1041.

IT IS HEREBY ORDERED that Defendant Bayer Corporation's Motion for Permanent Injunctive Relief [Doc. No. 56] is GRANTED. Keith Smith and Shirley Sperlazza are permanently enjoined from seeking certification of an economic loss class of West Virginia Baycol purchasers in the lawsuit styled Keith Smith, et al. v. Bayer Corporation, et al., No. 01-C-191 (Cir. Ct. Brooke co., W. Va.)

Date: December 9, 2008

s/ Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
Case No. 02-0199 (MJD/SRN)

[Filed August 25, 2008]

In Re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
GEORGE F. MCCOLLINS, individually, and on behalf of all others similarly situated,	)
	)
Plaintiff,	)
	)
v.	)
	)
BAYER CORPORATION, a foreign corporation authorized to do business in West Virginia; BAYER AG, a foreign corporation; and GLAXOSMITHKLINE plc, a foreign corporation,	)
	)
Defendants.	)

MEMORANDUM OF LAW & ORDER

Tim J. Yianne, Harry F. Bell, Jr., Bell & Bands, PLLC counsel for the George McCollins, Plaintiff.

Philip S. Beck, Adam Hoeflich, Bartlit Beck Herman Palenchar & Scott, LLP; Scott A. Smith, Tracy J. Van Steenburgh, Halleland, Lewis, Nilan, Sipkins & Johnson, P.A.; Susan A. Weber, James W. Mizgala, James R.M. Hemmings, Sidley Austin, LLP; Frank R. Volpe, Eamon P. Joyce, Sidley Austin, LLP; Richard K. Dandrea, Eckert Seamens, Cherin & Mellott, LLC; Peter W. Sipkins, Dorsey & Whitney, LLP; Douglas R. Marvin, Williams & Connolly counsel for Bayer Corporation, Defendant.

Fred T. Magaziner, Dechert, LLP, Counsel for SmithKline Beecham Corp. d/b/a GlaxoSmithKline, Defendant.

I. INTRODUCTION

This matter is before the Court on Plaintiff George McCollin's Motion to Remand to the Southern District of West Virginia [Docket No. 48]. Also before the Court is Defendant Bayer and GlaxoSmithKline ("GSK")'s Cross-Motion to Deny Class Certification and Enter Judgment Against the Plaintiff [Docket No. 49].

II. FACTUAL BACKGROUND

This action involves the prescription drug, cerivastatin, which was marketed in the United States under the brand name Baycol. Cerivastatin is a member of a class of drugs known as statins that have been routinely prescribed to lower the lipid levels of individuals with high cholesterol.

Baycol was approved by the FDA in June 1997, but in August 2001, it was withdrawn from the market after thirty-one deaths in the United States were linked to Baycol use. Thereafter, thousands of lawsuits commenced throughout the country in state and federal court, asserting, *inter alia*, claims of strict liability, negligence, breach of warranty and medical monitoring. Given the number of cases filed in federal court, the Judicial Panel on Multidistrict Litigation (JPML) consolidated the cases in this Court by Order dated December 18, 2001 pursuant to 28 U.S.C. § 1407 [Docket No. 1].

Plaintiff George McCollins, a West Virginia resident, brings this suit on behalf of himself and on behalf of a putative class of plaintiffs who "purchased Baycol as a cholesterol lowering product in West Virginia." (Compl. ¶ 1). Plaintiff's Motion to Remand seeks to have this case transferred to the transferor court, the Southern District of West Virginia. (Pl.'s Mot. for Remand 1).

Plaintiff seeks damages under West Virginia law for himself and the putative class in the nature of a refund for economic loss allegedly caused by Defendants' breach of express and implied warranties and violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA") (Pl.'s Mot. for Remand 1). Plaintiff proposes the class consist of "individuals who have at any time purchased Baycol in West Virginia from when Baycol was initially placed on the market in the United States until the present." (Pl.'s Mot. for Remand 2, ¶ 1). Defendants oppose remand and ask this Court to retain jurisdiction through summary judgment. Moreover, Defendants request prompt consideration by this Court of Plaintiff's class

action allegations through Defendants' Cross-Motion to Deny Class Certification and Enter Judgment Against Plaintiff.

III. DISCUSSION

A. Plaintiff's Motion to Remand

28 U.S.C. § 1407 provides, as follows:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation . . . and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .

28 U.S.C. § 1407(a).

As a result, remand at the conclusion of the pretrial proceedings is mandatory, whereas remand prior to the conclusion of pretrial proceedings is discretionary with the transferee court. See In re Bridgestone/Firestone, Inc., 128 F. Supp.2d 1196, 1197 (S.D. Ind. 2001)(citation omitted).

The power to remand a case to the transferor court lies solely with the JPML. See 28 U.S.C. § 1407(a). The role of the transferee court in reviewing a motion for

remand is to provide a suggestion or recommendation to the Panel. The suggestion of the transferee court carries great weight. See In re Evergreen Valley Project Litig., 435 F.Supp. 923, 924 (J.P.M.L.1977)(citation omitted).

In determining whether to issue a suggestion of remand to the JPML, the court should be guided by standards for remand employed by the Panel. In re Bridgestone/Firestone Inc., 128 F. Supp.2d at 1197. Generally, the decision to remand turns on the question of "whether the case will benefit from further coordinated proceedings as part of the MDL." Id.; see, e.g., In re Air Crash Disaster, 461 F.Supp. 671, 672-73 (J.P.M.L. 1978). Remand is appropriate when the discrete function performed by the transferee court has been completed. See In re Richardson-Merrel, Inc., "Bendectin" Prods. Liab. Litig. (No. II), 606 F.Supp. 715, 716 (J.P.M.L.1985).

Section 1407 contemplates that the transferee judge in his discretion "will conduct the common pretrial proceedings with respect to the actions and any additional pretrial proceedings as he deems otherwise appropriate." In re Evergreen Valley Project Litig., 435 F.Supp. at 924.

Moreover, under Pretrial Order No. ("PTO") 161, Section (4)(b), a case shall be ready for remand when: (1) Plaintiff's Fact Sheet is substantially complete and all identified deficiencies have been corrected; (2) Plaintiff has executed all appropriate authorizations, including HIPPA-compliant authorizations, as requested by defendants; (3) Case-specific fact and expert discovery has been completed; (4) The Court has ruled upon any pending motions affecting the case;

and (5) Mediation has been conducted pursuant to Section 4.a., and PTO 59. (See PTO 161 § (4)(b)).

The accrual of judicial expertise is central to the multi-district litigation process. Moreover, "[i]t is a fundamental assumption of the multidistrict system that having only one court sort out the facts of complex and multi-faceted transactions and occurrences which have given rise to many competing legal claims well serves the goal of judicial economy." In re Integrated Resources Inc., MDL No. 897, Misc. No. 21-61(RWS), No. 92 Civ. 4555(RWS), 1995 WL 234975, at *4 (S.D.N.Y. Apr. 21, 1995)(referencing In re Holiday Magic Securities and Antitrust Litig., 433 F.Supp. 1125, 1126 (J.P.M.L.1977)).

It is Defendants' position the Court should not remand a case that could be decided through "simple motion practice." Defendants also point out that this Court already knows the issues in this litigation and can therefore address summary judgment motions "expeditiously."

In response, Plaintiff argues there is no danger that the transferor court would duplicate efforts in order to learn the issues and theories of the case. This argument carries little weight. Any court that receives this matter will need to invest significant time learning the issues to decide the pending summary judgment motion and class certification should class certification not be decided by this Court.

Based upon the long-term duration of the Baycol MDL and the extensive background, expertise, and knowledge acquired by this Court over the course of this litigation, in conjunction with the fact that this

Plaintiff will still benefit from participation in the MDL, Plaintiff's motion to remand is denied. This Court will promptly consider Defendants' Cross-Motion to Deny Class Certification and Enter Summary Judgment Against Plaintiff.

B. Defendants' Cross-Motion to Deny Class Certification

1. Rule 23(a) Class Certification Threshold Requirements

Plaintiff seeks to certify a class of "individuals who have at any time purchased Baycol in West Virginia from when Baycol was placed on the market in the United States until the present." (Pl.'s Mot. For Remand 2). The class seeks recovery under the following theories: economic loss based on breach of express and implied warranties in violation of the WVCCPA. See W. Va. Code § 46A-6-106.

Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure there are four threshold requirements to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defense of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

The Court in this case, assumes, without deciding, that the requirements of Rule 23(a) are satisfied. Nevertheless, it is clear that this case is inappropriate for certification based on Rule 23(b)(3).

2. Rule 23(b)(3)

In general, "plaintiffs seeking class certification bear the burden of demonstrating that the class and any subclass meet the four requirements of Rule 23(a) as well as one of the criteria of Rule 23(b)." In re Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 66 (S.D.N.Y. 2002). The court may certify a class if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

In deciding whether the predominance and superiority requirements are met, district courts must consider the following factors:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the difficulties likely to be encountered in the management of a class action.

Id.

This Court has previously addressed attempts to certify a refund class under Fed. R. Civ. P. 23(b)(3) and (c)(4). See In re Baycol Prod. Litig., 218 F.R.D. 197,

213 (D. Minn. 2003) (Plaintiffs' motion to certify a refund class seeking restitution, disgorgement of profits and punitive damages based on claims of unjust enrichment and breach of implied warranty of merchantability and breach of warranty against redhibitory defects denied as plaintiffs failed to demonstrate that common issues of law predominate).

a. Predominance

Plaintiff argues that this case is appropriate for class treatment contrary to this Court's prior ruling denying certification of a nationwide personal injury, medical monitoring, punitive damages, and refund class because any individualized issues of fact and law that led the Court to previously deny certification are no longer present. See In re Baycol Prods. Liab. Litig., 218 F.R.D. at 213. Plaintiff relies on the fact that he proposes a West Virginia only class, which eliminates the issues associated with applying the laws of numerous state jurisdictions.

Defendants argue this Court has already ruled that economic loss claims cannot be litigated on a classwide basis because individual issues of fact predominate. Moreover, Defendants point out that the viability of Plaintiff's claims depends on whether patients received his or her money's worth from Baycol and to prevail plaintiffs would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any health benefits.

Focusing on the predominance issue, the Court is unpersuaded that the individualized issues of fact and law that led the Court to previously deny class certification are no longer present in this matter.

In prior Baycol proceedings this Court rejected the argument that to prove an unjust enrichment claim, plaintiffs need only show that plaintiffs paid the defendants, defendants accepted the payment and that it would be unjust for defendants not to return the payment. In re Baycol Prod. Litig., 218 F.R.D. at 213.

The Court noted plaintiffs' argument was contrary to direct testimony from the Plaintiffs' Steering Committee ("PSC") expert, Dr. Kaysen, who testified that "one would have to know whether or not they suffered any injury to be able to tell [whether plaintiffs received their money's worth from Baycol]." Id.

This Court further found that "contrary to plaintiffs' argument, to succeed on either the unjust enrichment or breach of warranty claims, plaintiffs would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any health benefits." Id. (referencing In re Rezulin, 210 F.R.D. at 61; accord Clay v. Am. Tobacco Co., 188 F.R.D. 483, 501 (S.D.Ill. 1999) (individual inquiry bears directly on liability for unjust enrichment)). Moreover, this Court found that "individual issues predominate, rendering class certification unwarranted." Id. at 214.

To recover under West Virginia law on any of Plaintiff's economic loss claims, including breach of express and implied warranty, unjust enrichment, and violations of the WVCCPA, Plaintiff must show an actual injury proximately caused by Defendants. See W. Va. Code § 46A-6-106 (requiring ascertainable loss of money or property resulting from prohibited or unlawful practice); Jones v. Purdue Pharma L.P., No. Civ. A. 5:01-1246, 2002 WL 32097528, *2 (S.D. W. Va.

Feb. 27, 2002) (finding causation is required for breach of warranty claims and alleged violations of the WVCCPA) (citing W. Va. Code § 46-2-714); Bertovich v. Advanced Brands & Importing, Co., No. 5:05CV74, 2006 WL 2382273, at *4-5 (N.D. W. Va. Aug. 17, 2006) (recognizing consumer protection act, unjust enrichment, negligence and other West Virginia claims required proof of "an actual injury to a legally protected interest").

The evidence supports the conclusion that individual issues of fact predominate with respect to whether Baycol benefitted or harmed any particular person. For example, to determine whether Baycol worked for any individual, it is necessary to consider that particular plaintiff's medical history. An in depth review of each plaintiff's medical records would require an examination of the individual's pre-existing conditions, prior statin reactions, the plaintiff's knowledge of the potential side effects associated with statins, and the warnings provided.

Individual evidence would be necessary as to each member of the putative class to determine whether the individual person benefitted from or was injured by Baycol. Therefore, as this Court determined previously, individual issues of fact predominate.

b. Superiority: Negative Value Lawsuit

The next requirement under Rule 23(b)(3) is that the class action be the 'superior' method of adjudicating this dispute. This Court has recognized that "[t]he most compelling rationale for finding superiority in a class action is whether the action is a negative value suit." In re Baycol, 218 F.R.D. at 210

(citing Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996)).

Plaintiff argues that each class member's individual stake is too low to justify the costs of individual litigation resulting in "a negative value" suit. Specifically, litigating an individual Baycol refund claim against Defendants to recover economic damages from purchasing Baycol would dwarf the amount of any individual claim. Plaintiff asserts that when the stakes of each class member are too low to repay the cost of the suit, class certification may be more compelling.

The Court recognizes that a class action appears to be the economically superior method for efficiently litigating the claims of the parties. Regardless, the evidence demonstrates that class certification is not appropriate because individual issues of fact predominate. Therefore, even if Plaintiff had met all requirements of Rule 23(a), Plaintiff's claims are not appropriate for class certification based on Rule 23(b)(3). As a result, Defendants' Cross-Motion To Deny Class Certification is granted. The Court will now address Defendants' Motion for Summary Judgment.

C. Defendants' Motion for Summary Judgment

1. Rule 56(b): Motion for Summary Judgment

Under Rule 56(b) of the Federal Rules of Civil Procedure, "a party against whom relief is sought may move at any time, with or without supporting

affidavits, for summary judgment on all or part of the claim." Fed. R. Civ. P. 56(b)(2008). Furthermore, "[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party seeking summary judgment bears the burden of showing that there is no disputed issue of material fact. Id. at 323. If the opposing party fails to make a showing that supports the existence of an element essential to the case on which they have the burden of proof at trial, summary judgment must be granted. Id. at 332-33.

A party facing summary judgment has an affirmative duty to put forth evidence to demonstrate a genuine issue for trial. Specifically,

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleadings; rather, its response must–by affidavits or as otherwise provided in this rule–set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed. R. Civ. P. 56(e)(2).

Defendants move for summary judgment and allege there is no evidence Plaintiff sustained an economic injury caused by Defendants as required under West Virginia law.

Specifically, Defendants argue West Virginia law requires proof that Defendants caused Plaintiff to suffer an actual financial injury caused by an alleged defect in the product or by Defendants' alleged misrepresentations. See Bertovich, No. 5:05CV74, 2006 WL 2382273, at *4-5 (stating, "under West Virginia law each cause of action [unjust enrichment, negligence, a violation of the WVCCPA] requires cognizable injury and a causal connection between that injury and Defendants' conduct") (citation omitted). See also Briehl v. Gen. Motors Corp., 172 F.3d 623, 627 (8th Cir. 1999) (citations omitted) (noting "liability does not exist in a vacuum; there must be a showing of some damage . . . . It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own.").

Plaintiff responds to Defendants' Motion for Summary Judgment in two paragraphs. First, Plaintiff does not dispute Defendants' assertions that Plaintiff has no "cognizable evidence" that he suffered an economic injury caused by Defendants. Moreover, Plaintiff does not deny Defendants' allegations that he sustained no personal injury from his Baycol use, or that he did not rely on any misrepresentations. Rather, Plaintiff argues that even if these are true, none of these allegations would conclusively establish judgment for Defendants.

Plaintiff relies on In re West Virginia Rezulin, wherein plaintiffs brought claims for refunds under the WVCCPA and the court found the plaintiffs' refund claims were appropriate for class certification. 585 S.E.2d 52 (W. Va. 2003). Plaintiff alleges that to proceed under this Act, neither Plaintiff nor the class needs to establish personal injury or reliance. Rather, to establish a loss under the WVCCPA, Plaintiff alleges he need only show "he or she has purchased an item that is different from or inferior to that for which he bargained." See In re Rezulin, 585 S.E.2d at 57.

As a result, Plaintiff alleges there are disputed facts about whether or not Baycol was "different from" or "inferior to" the product for which Mr. McCollins bargained, and therefore summary judgment is inappropriate.

Under the WVCCPA:

> Any person who purchases . . . goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action . . . to recover actual damages or two hundred dollars, whichever is greater.

W. Va. Code § 46A-6-106(1).

"[F]or a consumer to make out a prima facie case to recover damages for 'any ascertainable loss' under W. Va. Code 46A-6-106, the consumer is not required to

allege a specific amount of actual damages. If the consumer proves he or she purchased an item different from or inferior to that for which she bargained, the 'ascertainable loss' requirement is satisfied." In re Rezulin Litig., 585 S.E. 2d at 75. The meaning of "ascertainable loss" has been defined as follows:

> [T]he inclusion of the word "ascertainable" to modify the word "loss" indicates that the plaintiffs are not required to prove actual damages of a specific dollar amount. "Ascertainable" means "capable of being discovered, observed or established." "Loss" has been held synonymous with deprivation, detriment and injury. It is a generic and relative term. . . .Whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . When a product fails to measure up, the consumer has been injured, he has suffered a loss.

Id. at 74-75. Therefore, to succeed under the WVCCPA, Plaintiff must demonstrate Baycol was "something other than what he bargained for."

Mr. McCollins was diagnosed with high cholesterol in December 1992. (Skeens Dep. (Def.'s Ex. A) at 12:13-21, 13:11-14:17). During the time Mr. McCollins took Baycol, his cholesterol, HDL and LDL levels remained within normal range. (Id. at 76:10-79:20). Most telling, Dr. Skeens testified, to a reasonable degree of medical certainty, that Baycol not only was

"safe and effective in Mr. McCollins," but "was perfect for [him]." (Id. at 86:8-13, 77:18).

Mr. McCollins does not dispute that Baycol worked for him. (See McCollins Dep., (Def.'s Ex. C) at 111:11-113:6) (testifying he had "no idea" as a layperson whether Baycol worked for him, and deferring to the medical records regarding his cholesterol); (id. at 158:16-159:1) (deferring to a physician on whether Baycol was a "good drug").

Baycol was routinely prescribed to lower the lipid levels of individuals with high cholesterol. As noted above, Plaintiff purchased Baycol with knowledge of its risks. Defendants have demonstrated, and Plaintiff does not refute, that Baycol was safe and effective for him. His use of Baycol was not associated with any side effects. It was exactly what he bargained for–a cholesterol medication that would lower his cholesterol. There is nothing about Mr. McCollin's use of Baycol that would lead to a deprivation, detriment or injury that is capable of being discovered. Baycol did not "fail to measure up" in Mr. McCollin's case. In fact, it served its exact purpose. Mr. McCollins got what he bargained for. As a result, Mr. McCollins has suffered no ascertainable loss.

Accordingly, based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion to Remand [Docket No. 48], is **DENIED**,

2. Bayer and GSK's Cross-Motion to Deny Class Certification and Enter Judgment Against the

Plaintiff [Docket No. 49], is **GRANTED**. This matter is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 24, 2008

s/Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUN 24 2010
OFFICE OF THE CLERK

No. 09-1205

IN THE

Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether absent class members who were adequately represented in class certification proceedings are bound by a final judgment denying class certification.

2. Whether the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and the authority vested by the All Writs Act, 28 U.S.C. § 1651, permit a district court to enjoin adequately represented absent class members from relitigating in state court a final judgment denying class certification that is enmeshed with a substantive ruling of law.

RULE 29.6 DISCLOSURE

Bayer Corporation is a wholly owned subsidiary of Bayer AG. No publicly held company owns more than 10% of the stock of Bayer AG.

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BRIEF IN OPPOSITION

This case arises from an attempt by petitioners Keith Smith and Shirley Sperlazza to relitigate in West Virginia state court certification of the same putative class denied certification by the federal court overseeing the Baycol product liability multi-district litigation ("MDL"). Baycol is a cholesterol-reducing medicine that respondent Bayer Corporation voluntarily withdrew from the market in 2001.

It is undisputed that petitioners are identically situated to the named plaintiff in the underlying federal court case: none suffered an injury caused by Baycol. All nevertheless asserted class economic loss claims on the theory that proof of injury is not required to pursue these claims, and that neither they nor anyone else in the State of West Virginia would have filled a Baycol prescription, had they known then what they know now.

Applying well-settled principles under the All Writs Act and Anti-Injunction Act, and even more well-settled standards for granting equitable relief, the United States District Court for the District of Minnesota (Davis, C.J.) enjoined petitioners from relitigating certification of a West Virginia economic loss class. The district court held that petitioners were absent members of the putative class previously denied certification in federal court and that petitioners were bound by that final judgment because their interests had been adequately, indeed vigorously, represented. The district court further held that petitioners were seeking to relitigate a substantive issue enmeshed with the court's class certification decision. The court therefore barred petitioners from relitigating class certification in West Virginia state court, but narrowly tailored its

injunction so as not to hinder their pursuit of individual claims. A unanimous panel of the court of appeals (Murphy, Smith, Benton, JJ.) affirmed.

Petitioners ask this Court to review their claims that: (I) petitioners have a due process right to relitigate judgments denying class certification because absent class members can be bound only if a class is certified (Pet. 20-31); and (II) the relitigation exception to the Anti-Injunction Act does not apply because a West Virginia state court might certify a putative class denied certification in federal court (*id.* at 7-19). The court of appeals rejected these judicially inefficient "'heads-I-win, tails-you-lose'" arguments,[1] holding that constitutionally adequate representation binds absent class members to a final judgment denying class certification and that petitioners cannot evade the relitigation exception by speculating that another court might decide an underlying question of substantive law, and consequently class certification, differently.

The judgment below is narrow and does not warrant this Court's review. First, none of this Court's decisions supports petitioners' claim that adequately represented – in fact, identically situated – absent class members are not bound by a final judgment denying class certification and therefore may relitigate the issue until they find a court that will certify their proposed class. Although petitioners claim a circuit split on this issue, there is none. Petitioners rely on cases in which the absent class members were not adequately represented in the initial class action; therefore, the decisions

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[1] Pet. App. 11a (quoting *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003)).

denying class certification would not be given preclusive effect in any circuit.

Second, none of the decisions cited by petitioners supports their claim that, where a final federal judgment denying class certification is enmeshed with substantive rulings of law, absent class members may relitigate the intertwined substantive holdings and class certification decision in state court. The decisions from this Court and from other circuit courts cited by petitioners involve cases in which the underlying judgment was not enmeshed with substantive holdings or was not final.

Third, certiorari should be denied because the circumstances of this case are unlikely to recur. If petitioners' lawsuit were filed today, it would be removed under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, and adjudicated in federal court alongside other cases seeking certification of the same class. The enactment of CAFA significantly reduces the chances of parallel class actions in state and federal courts, and further dramatically reduces the likelihood that the issues presented here will recur.

This case is anomalous in another important way. Petitioners waited seven years after filing their lawsuit before seeking class certification. During the intervening years, Bayer settled the claims of more than 3,100 persons who suffered rhabdomyolysis, the side effect that led to the withdrawal of Baycol, for $1.17 billion, and vigorously contested the lawsuits of tens of thousands of plaintiffs who did not suffer that side effect. Virtually all of the latter cases have been terminated without compensation. Petitioners apparently held back in the hope that Bayer would change its position and settle no-injury claims in the waning days of the Baycol litigation. In so doing,

petitioners created the unusual situation in which a class decision in the MDL obtained sufficient finality to have preclusive effect while their state court class claims remained unresolved. These unusual circumstances cast a long shadow over the fairness of further review by this Court.

For all these reasons, the petition for certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

1. Baycol (cerivastatin) is a prescription cholesterol-reducing medicine that Bayer distributed in the United States with the approval of the United States Food and Drug Administration from 1997 to 2001. *See In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201 (D. Minn. 2003) (summarizing Baycol history). Baycol is a "statin," a member of the same family of medications as Lipitor, Zocor, and Crestor. *See id.*

Like all other statins, Baycol has been associated with muscle aches and pains, as well as more serious side effects, such as rhabdomyolysis (a severe breakdown of muscle tissue where the substances released into the bloodstream may overwhelm the kidneys). *See id.* Baycol's labeling warned about these and other side effects, including the risk of using another class of lipid-lowering drugs (called "fibrates") concurrently with Baycol. Ultimately, the Baycol labeling contraindicated concurrent use of Baycol and one fibrate, gemfibrozil, "due to a risk for rhabdomyolysis."[2] Nevertheless, Bayer continued to receive reports of rhabdomyolysis in patients who were being prescribed Baycol with gemfibrozil. Bayer

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[2] *See, e.g.*, July 2000 Label, *available at* http://www.accessdata.fda.gov/drugsatfda_docs/nda/2000/20-740S008_Baycol_prntlbl.pdf.

therefore voluntarily withdrew Baycol from the market in August 2001.[3]

2. Tens of thousands of state and federal court actions were filed after the withdrawal of Baycol. Pet. App. 37a. The Judicial Panel on Multidistrict Litigation established MDL-1431 in the United States District Court for the District of Minnesota to coordinate discovery and other pre-trial matters for federal court cases. *See In re Baycol Prods. Liab. Litig.*, No. 1431, 2001 WL 34134820, at *1-2 (J.P.M.L. Dec. 18, 2001). From the first year of this litigation, the district court supervised a settlement program that to date has paid $1.17 billion to 3,144 claimants who suffered rhabdomyolysis, the specific side effect that led to the withdrawal of Baycol from the market.

Bayer has vigorously litigated all other claims, including cases alleging injuries other than rhabdomyolysis and cases seeking economic recovery for plaintiffs, like petitioners, who benefited from and were not injured by Baycol. Bayer has won defense victories in each of the six Baycol cases tried to juries, all in state courts. Of the approximately 40,000 plaintiffs who filed Baycol cases (22,500 in federal court and 17,500 in state courts), fewer than 150 still have cases pending. Bayer has defeated motions for class certification in the MDL and other jurisdictions.[4]

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[3] *See* "Dear Healthcare Professional" Letter (Aug. 8, 2001), *available at* http://www.fda.gov/downloads/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/UCM173692.pdf.

[4] *In re Baycol Prods. Litig.*, 218 F.R.D. at 202, 215-16 (denying certification of nationwide injury, medical monitoring, and economic loss classes); *Lewis v. Bayer AG*, 70 Pa. D & C.4th 52 (Pa. Ct. Com. Pl. 2004), *available at* 2004 WL 1146692, at *18-19 (denying certification of nationwide injury, medical monitor-

3. In addition to managing common issue discovery, the district court supervised case-specific discovery and motion practice in all MDL cases. In one such case, plaintiff George McCollins sought certification of a class of West Virginia Baycol purchasers, asserting claims for purported economic loss caused by Bayer's alleged breach of warranties and violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-6-101 *et seq.* Pet. App. 41a.[5] His doctor testified that Mr. McCollins did not suffer any injury as a result of Baycol, and that Baycol worked to reduce Mr. McCollins' cholesterol. *Id.* at 50a-51a.

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ing, and economic loss classes, and Pennsylvania injury and medical monitoring classes); *Lewis v. Bayer AG*, No. 002353 (Pa. Ct. Com. Pl. Sept. 19, 2005) (unreported) (entering summary judgment for Bayer and against a Pennsylvania medical monitoring class); *Jensen v. Bayer AG*, No. 01 CH 13319, 2003 WL 22962431, at *5 (Cir. Ct. Cook Co., Ill. Dec. 15, 2003) (denying certification of nationwide personal injury, medical monitoring, and economic loss class); *De Bouse v. Bayer AG*, 922 N.E.2d 309, 313-19 (Ill. 2009) (ordering trial court to vacate certification of Illinois economic loss class and enter summary judgment against named plaintiff); *Cafky v. Bayer AG*, No. C-01-713 (Dist. Ct. Pottawatomie Co. Oct. 15, 2008) (unreported) (vacating certification of Oklahoma injury class); *see also In re Baycol Cases I & II*, No. B204943, 2009 WL 3353536, at *5-6 (Cal. Ct. App. Oct. 20, 2009) (reviewing the sustaining of a demurrer on, *inter alia*, California economic loss class claims, and dismissing the appeal on grounds that the appeal was untimely), *review granted*, No. S178320 (Cal. Feb. 18, 2010) (limited to time for appeal of the sustaining of the demurrer).

[5] Three plaintiffs brought the *McCollins* action in August 2001: Michael Black, Peggy Ann Mays, and George McCollins. *McCollins* was removed to federal court and transferred to the Baycol MDL. Developments subsequent to transfer – Ms. Mays being omitted from amended complaints, and Mr. Black's claims being dismissed with prejudice – left Mr. McCollins as the lone putative class representative.

On August 25, 2008, the district court denied class certification, concluding that individual issues of fact predominated because proof of economic loss claims under West Virginia law would require each putative class member to present "[i]ndividual evidence" sufficient "to determine whether the individual person benefitted from or was injured by Baycol." Pet. App. 45a. The district court assumed Mr. McCollins adequately represented the putative class. *Id.* at 41a.

The district court also entered summary judgment against Mr. McCollins on his individual claims. Pet. App. 46a-52a. Neither Mr. McCollins nor any absent class member appealed the judgment, which became final on September 25, 2008. *Id.* at 12a-13a, 26a.

4. Petitioners Keith Smith and Shirley Sperlazza moved for certification of a West Virginia economic loss class five days after the *McCollins* judgment became final. Pet. 3. Petitioners had filed their lawsuit (*"Smith"*) in the Circuit Court of Brooke County, West Virginia in September 2001. *Id.* at 2. The case could not be removed to federal court because petitioners and a third plaintiff sued two West Virginia defendants. *Id.* at 2 n.1. Those non-diverse defendants later were dismissed, but only after the one-year deadline for removal under 28 U.S.C. § 1446.[6] Bayer could not remove *Smith* under CAFA because the action was filed and the parties became diverse before CAFA's effective date. *See* Pub. L. No. 109-2, § 9, 119 Stat. at 14; *see also* 28 U.S.C. § 1332 notes (incorporating section 9 of CAFA).

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[6] The third plaintiff, Nancy Gandee, settled her claim in July 2003, and the non-diverse defendants were dismissed at that time. Pet. 2 n.1.

The *Smith* complaint sought certification of a West Virginia class, asserting claims for personal injury, medical monitoring, and economic loss. Pet. 2-3. The doctor who treated both petitioners testified that they (like Mr. McCollins) experienced no side effects from Baycol and that Baycol reduced their cholesterol. Pet. App. 13a (petitioners' theory for recovery is "ability to recover for economic loss despite the absence of physical injury").

On September 30, 2008 – seven years after filing their complaint – petitioners finally moved for class certification, asking the Circuit Court of Brooke County, West Virginia to certify an economic loss class of West Virginia Baycol purchasers, asserting claims for breach of warranty, common law fraud, and violation of the WVCCPA. Pet. 3. Petitioners did not seek to certify personal injury and medical monitoring claims, thereby narrowing their putative class to overlap with the class denied certification in the final *McCollins* judgment. Pet. App. 13a.

5. Bayer moved the district court to enjoin petitioners from relitigating the denial of certification of a West Virginia economic loss class. Pet. App. 5a, 21a. The district court held that the proposed injunction fell within the scope of the relitigation exception to the Anti-Injunction Act because: (a) the economic loss class that petitioners sought to certify was identical to that denied certification in *McCollins* and presented the same threshold issue of substantive law, *id.* at 25a-26a; (b) petitioners were absent class members of the putative *McCollins* class, *id.* at 31a-32a; (c) petitioners' interests in obtaining certification of a West Virginia economic loss class were adequately represented by Mr. McCollins, *id.*; and (d) the *McCollins* denial of class certification was final, *id.* at 26a-29a.

The district court also held that petitioners were subject to the court's jurisdiction because they were absent members of the putative *McCollins* class whose interests in securing class certification were adequately represented by Mr. McCollins. Pet. App. 24a-32a. After concluding that the balance of equities supported the issuance of an injunction to protect its final judgment in *McCollins*, the district court enjoined petitioners from "seeking certification of an economic loss class of West Virginia Baycol purchasers." *Id.* at 34a. Of particular importance, nothing in the district court's order hinders petitioners from pursuing their individual claims in West Virginia state court. *Id.* at 15a, 16a.

The Eighth Circuit affirmed without dissent. On *de novo* review, the panel held:

- The class claims asserted by the *Smith* plaintiffs were identical to those in *McCollins* and were "'enmeshed'" with the same substantive issue of West Virginia law as in *McCollins*, Pet. App. 8a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978));
- The relitigation of class certification by the *Smith* plaintiffs "would undermine [the] conclusion of substantive state law properly made by the district court," *id.*;
- No substantive difference between the federal standard for class certification and its West Virginia counterpart justified a retesting of the *McCollins* class claims in a West Virginia state court, *id.* at 7a-10a; and
- The *Smith* plaintiffs were absent members of the *McCollins* class, who were bound *in personam* by the denial of class certification because any limited due process interest in

> securing certification of a West Virginia economic loss class was protected by the adequate representation of Mr. McCollins, petitioners' right to appeal the *McCollins* decision, and petitioners' continuing right to pursue their individual claims, *id.* at 13a-15a.

Emphasizing the importance of finality to the just and efficient administration of multidistrict litigation (Pet. App. 12a), the court of appeals held that the district court properly invoked the relitigation exception to the Anti-Injunction Act and the authority of the All Writs Act, and exercised sound discretion in crafting a narrow injunction that protected its order in *McCollins*. *Id.* at 16a-17a.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for three reasons. First, the judgment below does not conflict with this Court's decisions relating to the exercise of personal jurisdiction over absent members of a putative class. None of those decisions holds, as petitioners argue, that an absent class member's interest in relitigating class certification is entitled to the same level of procedural protection as his claim on the merits. Moreover, neither of the appellate court judgments cited by petitioners on the question of personal jurisdiction conflicts with the holding here – that an adequately represented absent class member is bound by a decision denying class certification.

Second, the judgment below does not create a conflict with decisions of this Court or any court of appeals concerning the Anti-Injunction Act. None of the decisions cited by petitioners involves protection of a final federal judgment denying class certification

where, as here, that judgment is based on a conclusion of substantive law.

Finally, the particular circumstances that led to the issuance of this injunction are unlikely to recur. The enactment of CAFA greatly reduces the possibility of identical classes being litigated in state and federal courts. Moreover, the federal judgment denying class certification became final and preclusive only because petitioners waited seven years to press their class claims in state court. That situation is anomalous and therefore the prospective importance of the decisions of the courts below is exceedingly limited. For all these reasons, certiorari should be denied.

I. Petitioners contend that they cannot be bound by the injunction because they were not named parties in *McCollins* and did not receive notice or the opportunity to opt out. Pet. 20-31 (relying on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)). They freely acknowledge that their rationale would allow absent class members to benefit from a decision to certify while remaining free to relitigate time and again a judgment denying class certification. *Id.* at 25-27, 29-31. Petitioners contend that, in rejecting this lopsided view of the law, the Eighth Circuit decision conflicts with precedents of this Court and two courts of appeals. *Id.* at 20-31. Petitioners are mistaken.

The Eighth Circuit held that "[t]he nature and degree of due process protections necessary to establish personal jurisdiction depends on context." Pet. App. 15a. In the context of denial of class certification, adequate representation and the rights to appeal and to pursue their individual claims "satisfy due process and are sufficient to bind them in

personam to the district court's certification decision." *Id.*[7]

A. Contrary to petitioners' claim, this judgment does not conflict with the precedents of this Court. In *Shutts*, this Court held that absent class members cannot be bound to a decision on the merits in an action for damages unless they receive notice and the opportunity to opt out of the class. *Shutts*, 472 U.S. at 806-14; Pet. 21-22 (quoting *Shutts*). Here, the lower courts did not decide the merits of the claims of absent class members. Pet. App. 15a-16a, 32a-34a. Petitioners are free to pursue their individual causes of action. *Id.* at 15a, 16a. Petitioners are barred only from relitigating class certification. *Id.* at 5a, 15a, 16a, 34a.[8]

As the Seventh Circuit observed in enjoining absent class members from relitigating the denial of class

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[7] *See generally Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (procedural due process is contextual and depends not only on the nature of the right to be protected, but also the burdens of providing greater levels of procedural protection).

[8] This decision is consistent with other opinions of this Court recognizing that "[n]onnamed class members . . . may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002) (holding absent class members may appeal class-related decisions without first intervening to obtain "named party" status because absent class members have an interest in those decisions); *see also* 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 16.01 (4th ed. 2002) ("Absent class members are parties for purposes of being bound by the judgment, receiving the benefit of the tolling of the statute of limitations, meeting the venue requirements, and having standing to appeal from decisions and to object to and enforce settlements.") (footnotes omitted).

certification in another MDL, "no statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step." *In re Bridgestone/ Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003) (holding federal denial of class certification binds adequately represented absent class members); *see also* Fed. R. Civ. P. 23(c)(2) (requiring notice for "certified" classes); *Pan Am. World Airways, Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1073, 1079 (9th Cir. 1975) ("notice . . . may not issue before a class action has been certified"); *Farmers Coop. Co. v. United States*, 90 Fed. Cl. 72, 73 (Fed. Cl. 2009) ("Plaintiff does not cite, and this court is not aware of, a single case wherein a federal court permissibly notified potential plaintiffs of an on-going case before class certification.").

Petitioners also contend that the judgment below conflicts with this Court's proscription of "virtual representation" – the practice by which a decision on the merits in a non-class claim is applied to bar relitigation of the same issue by another plaintiff. *See Taylor v. Sturgell*, 128 S. Ct. 2161 (2008). *Taylor*, however, explicitly carved out from this prohibition properly conducted class actions. *Id.* at 2167. Petitioners therefore cannot demonstrate a conflict between the decision below and this Court's precedents.

B. Petitioners next assert that the judgment below conflicts with Eleventh and Third Circuit opinions characterizing absent class members as "strangers" to proceedings once class certification has been denied. Both cases are distinguishable.

1. Petitioners cite the Eleventh Circuit's decision in *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233 (11th Cir. 2006), to support their claim

of a circuit split. Pet. 23-24. But in *Bayshore*, the putative class had not been adequately represented in the underlying case in which certification was denied. 471 F.3d at 1245 n.27.[9] Therefore, under Seventh and Eighth Circuit precedents, absent class members would not have been bound by the decision denying class certification. Indeed, contrary to petitioners' contention that "there is no language in [*Bayshore*] indicating that its decision . . . would have been different if class certification had been denied" for any reason other than the inadequacy of the putative class representative (Pet. 23 n.53), the *Bayshore* court favorably cited the Seventh Circuit's decision in *Bridgestone/Firestone*, which held that adequately represented members of a class denied certification in federal court should be enjoined from relitigating class certification in state court. 471 F.3d at 1245 n.27.

2. Petitioners also rely on the Third Circuit's decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998), another case in which there was no

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[9] Petitioners contend that the district court's determination that Mr. McCollins adequately represented absent class members is a "*post hoc* judgment" forbidden by *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). Pet. 23 n.53. There, this Court required "that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court" for the relitigation exception to apply. 486 U.S. at 148. But *Chick Kam Choo* was not discussing the findings needed to determine whether the exercise of the Court's injunctive authority was consistent with due process, only whether the actual issue sought to be relitigated had been decided. Here, the issue shielded from relitigation – the denial of certification of a West Virginia economic loss class – was unquestionably decided in *McCollins*. Pet. App. 13a-14a, 41a-46a.

finding that the interests of absent class members had been adequately represented in the federal class proceedings. *Id.* at 138-39. Although *General Motors* stated that absent class members were not parties before the court where certification had been denied in the underlying case (*id.* at 141), the circumstances were considerably different from this case: appellants in *General Motors* sought an injunction of a final state court class settlement through which more than 5.7 million people already had resolved their claims. *Id.* at 139-40. The Third Circuit has not been called on to address a situation in which adequately represented absent class members were seeking to relitigate the denial of class certification – the circumstance presented in *Bridgestone/Firestone* and in the present case.

C. Finally, petitioners assert that their due process rights were violated because they were unaware of the *McCollins* case and judgment and therefore could not appeal. Petitioners' present unsworn assertion is doubtful. Pet. 4. *McCollins* was filed in West Virginia state court one month before petitioners filed their own case, and petitioners' counsel had another case pending in the Baycol MDL at the time of the *McCollins* judgment. Pet. App. 3a-4a; Pet. 4 n.4.[10] Whether petitioners actually knew about the *McCollins* judgment, of course, does not warrant review.

II. Petitioners next contend that application of the relitigation exception to the Anti-Injunction Act conflicts with decisions of this Court and certain courts of appeals. Again, this claim is wrong.

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[10] The district court entered summary judgment against the plaintiff in *Ballard v. Bayer Corp.*, No. 03-cv-5984 (D. Minn.), on October 24, 2008.

The Anti-Injunction Act bars injunctions directed to state courts, except in three specific circumstances. 28 U.S.C. § 2283. One of those circumstances – the "relitigation exception" – explicitly permits the issuance of an injunction to "protect or effectuate [the] judgments" of a district court, *id.*, a principle "founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988); *see also Rivet v. Regions Bank of La.*, 522 U.S. 470, 478 n.3 (1998).

The district court decided in *McCollins* that a West Virginia economic loss class could not be certified because West Virginia substantive law required plaintiffs individually to prove injury and causation and individual issues of fact therefore predominated. Pet. App. 41a-46a. In later enjoining the *Smith* class certification proceedings and in affirming that injunction order, the district court and Eighth Circuit concluded that petitioners sought to relitigate that same legal issue in pursuing class certification in state court. *Id.* at 7a-12a, 25a-26a.

A. Petitioners first contend that the decisions below conflict with *Chick Kam Choo*, which upheld the injunction of claims already adjudicated in federal court, but ruled that the injunction should be narrowed to exclude claims dismissed under the federal *forum non conveniens* doctrine. 486 U.S. at 148-51. As the Eight Circuit concluded (Pet. App. 10a-11a), *Chick Kam Choo* is distinguishable.

1. Unlike *Chick Kam Choo*, petitioners here seek to relitigate in state court the district court's substantive determination of an issue of law, which was a necessary predicate to the court's class certification ruling. It is well-established that "a certification determination 'involves considerations that are enmeshed in the factual and legal issues

comprising the plaintiff's cause of action.'" Pet. App. 8a (quoting *Coopers & Lybrand*, 437 U.S. at 469).

To decide whether common issues of fact predominated here, the district court had to determine the evidence necessary to prove the alleged economic loss claims under West Virginia law. Pet. App. 43a-45a. The district court therefore examined the West Virginia consumer fraud statute (the WVCCPA) and concluded that individual proof of actual injury and proximate causation would be required for each class member. *Id.*[11]

As the court of appeals explained, "[t]his conclusion has a preclusive effect and is inseparable from the certification question. That [petitioners] may disagree with the district court's legal conclusions about the WVCCPA is unavailing." Pet. App. 10a (footnote omitted) (citing *Liberty Mut. Ins. Co. v. FAG Bearings*

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[11] Petitioners are mistaken in suggesting that consideration of these issues involved an improper adjudication on the merits. Pet. 17-18. It is settled that "the principle that district courts should not evaluate the merits of plaintiffs' claims should not be talismanically invoked to artific[i]ally limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden" under Rule 23. *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009) (internal quotation omitted) (alteration in original). *Accord Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 380-81 (5th Cir. 2007); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001). The decisions that petitioners cite stand only for the unremarkable proposition, not at issue in this matter, that class certification decisions and decisions on the merits are separate. *See, e.g., Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 336-40 (1980) (distinguishing interests in pursuing substantive claims and class claims); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-04 (1980) (noting that class claims and substan-tive claims are "two separate issues").

Corp., 335 F.3d 752, 763 (8th Cir. 2003)); *accord Starker v. United States*, 602 F.2d 1341, 1347 n.3 (9th Cir. 1979) ("The correctness of the ruling in [the prior action] is irrelevant for collateral estoppel purposes.").

2. Petitioners contend that, because the West Virginia Supreme Court certified an economic loss class in *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52 (W. Va. 2003), West Virginia class certification standards must be different from federal standards. *See* Pet. 14-17. However, West Virginia's class certification rule tracks Federal Rule 23. *Compare* W. Va. R. Civ. P. 23, *with* Fed. R. Civ. P. 23; *cf. Chick Kam Choo*, 486 U.S. at 148-51 (difference in federal and state *forum non conveniens* standards was undisputed).[12] Moreover, *Rezulin* held only that a difference in the amount of damages is not enough to establish predominance of individual issues of fact. Pet. App. 9a-10a, 25a. Several federal cases follow the same approach.[13]

For these reasons, *Chick Kam Choo's* holding with respect to the preclusive effect of federal *forum non conveniens* law does not support petitioners' claim that class certification decisions are not entitled to preclusive effect in the very different circumstances presented here.

B. Petitioners also contend that the decision below conflicts with opinions of the Third and Fifth

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[12] Petitioners note that Federal Rule 23 decisions are persuasive but not binding on West Virginia courts. Pet. 14-17 (citing *Rezulin*). But this does not establish a substantive difference in class certification standards. Pet. App. 7a

[13] *See, e.g., Seijas v. Republic of Arg.*, ___ F.3d ___, 2010 WL 2105132, at *3 (2d Cir. May 27, 2010); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).

Circuits. Pet. 10-12 (quoting *Gen. Motors*, 134 F.3d at 146, and *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996)). However, in both cases, the courts of appeals held that the underlying decisions denying class certification lacked the finality to have preclusive effect. *Gen. Motors*, 134 F.3d at 146; *J.R. Clearwater*, 93 F.3d at 179. Here, in contrast, the finality of the underlying *McCollins* judgment is not in dispute.

Moreover, the underlying decision in *General Motors*, reversing certification of a settlement class, was not based on substantive conclusions of state law, as is the case here. Pet. App. 11a n.6 (discussing *Gen. Motors*, 134 F.3d at 146). Similarly, nothing in *J.R. Clearwater* suggests that relitigation of a class certification decision can be used collaterally to attack a conclusion of substantive law underlying a final federal court judgment denying class certification. To the contrary, *dicta* in *J.R. Clearwater* focus on the discretionary aspects of class certification decisions, not on certification decisions grounded in holdings of law, like this one. 93 F.3d at 178-79.

C. Petitioners also contend that the court below erred in applying a collateral estoppel bar because the *Smith* complaint contains a cause of action for common law fraud that was not included in *McCollins*. Pet. 10. This is an argument for error correction and does not warrant review by this Court. In any event, petitioners cannot avoid issue preclusion on this basis because "'[t]he same cause of action framed in terms of a new legal theory is still the same cause of action.'" *See* Pet. App. 10a n.5 (quoting *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1015 (8th Cir. 2002)); *accord Taylor*, 128 S. Ct. at 2171 ("Issue preclusion . . . bars 'successive litigation of an issue of fact or law actually litigated and

resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.") (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)).

III. Finally, certiorari should be denied because the circumstances that led to issuance of the injunction are unlikely to recur.

A. This case is a relic of pre-CAFA class action and removal law. The case was not removable when filed in 2001 because petitioners sued West Virginia defendants involved in treating one of the three plaintiffs. By the time those non-diverse parties were dismissed, the one-year window for removal had passed. Pet. 2 n.1; 28 U.S.C. § 1446(b). This set the stage for litigation of parallel classes in state and federal courts.

That would not be the case today. Five years ago, Congress enacted CAFA, opening the federal courts to putative class actions in which the amount in controversy exceeds five million dollars, minimum diversity exists and the proposed class exceeds 99 persons. 28 U.S.C. § 1332(d)(2) & (5)(b).[14] Under current law, this case would be removed, *see id.* § 1453(b), and transferred to the Baycol MDL, where the district court would address certification of a West Virginia economic loss class in *McCollins* and *Smith* at the same time. There would be no need for the district court to protect its final class certification ruling from relitigation in state court.

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[14] Since federal jurisdiction was broadened by CAFA, the number of federal class actions has increased significantly. *See* Emery Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 1-3 (Apr. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

The enactment of CAFA has dramatically reduced the risk of duplicative parallel class litigation in state and federal courts. This Court should not expend its limited resources reviewing a dispute that would not exist had petitioners' action been filed after 2005.

B. The circumstances that led to issuance of this injunction are anomalous for another reason: it is unusual that an MDL class certification decision be adjudicated and become final before class certification is litigated in state court. Here, petitioners filed their lawsuit in September of 2001, but did not move for class certification until September of 2008.

In the intervening years, the MDL court supervised all common issue discovery; supervised the national Baycol mediation and settlement program; ruled on (denied) the MDL plaintiff steering committee's motion for certification of a national class; ruled on *Daubert* motions challenging expert testimony on issues of general applicability; supervised case-specific written and medical record discovery; conducted a pilot program in an effort to prepare a sample of cases for trial; when none of the pilot program cases survived to go to trial, required plaintiffs to produce individual case-specific expert reports in support of their claims; and only then moved to case-specific depositions and motion practice in the remaining cases.

Petitioners made the tactical decision to move slowly on class certification, in the apparent hope that Bayer would change its settlement position and start paying no-injury claims in the final stages of the Baycol litigation. It is only because of petitioners' delay that the *McCollins* decision denying class certification was reduced to a final judgment before petitioners filed their motion for class certification. Indeed, *McCollins* was one of only approximately 75

cases in the Baycol MDL that survived to the stage of individual motion practice.

There are very few instances in which a federal class certification decision will achieve sufficient finality to support an injunction against state court plaintiffs seeking class certification. Because the circumstances of this case are so unusual, review by this Court is not warranted.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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REPLY BRIEF

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In the Supreme Court of the United States

KEITH SMITH and SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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REPLY

I. Respondent's Reasons For Denying The Petition Are Flawed

Respondent postulates that this case does not warrant the Court's review because the judgment below is narrow. Respondent advances three arguments as support for its position. First, because the district court below found that petitioners were adequately represented in the McCollins case, respondent contends petitioners are wrong in asserting that the judgment below conflicts with decisions of this Court or any circuit court of appeals. Second, it submits that, unlike the judgment below, all of the decisions relied upon "by petitioners involve cases in which the underlying judgment was not enmeshed with substantive holdings or was not final." Third, it claims that the circumstances of this case are unlikely to recur because the odds of parallel class actions existing in state and federal courts are dramatically reduced by the enactment of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4. (Brief in Opp. at 2-4).[1]

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[1] As a parting jab, respondent also argues that this case is anomalous due to the length of time between the filing of petitioners' underlying lawsuit and the noticing of a hearing on the issue of class certification. Without any basis in fact, respondent suggests that petitioners were waiting to see if respondent would change its position on paying economic-loss-only claims (or as earlier suggested to the district court and Eighth Circuit, if the MDL court would grant class certification) and that this strategy or motive is responsible for the situation in which petitioners now find themselves. While the significant delay in having a class-certification hearing is indeed regrettable, it was not due to any motive or strategy on petitioners' part. Rather, as

The arguments of respondent reflect a "talent for trivializing the momentous and complicating the obvious."[2] Respondent ignores or at least downplays the significant deprivation of petitioners' due-process rights as well as the substantial encroachment on principles of federalism and comity--principles that are at the heart of the Anti-Injunction Act and the doctrine of collateral estoppel--caused by the judgment below. Respondent attempts to complicate the picture and obscure the obviousness of these violations by relying upon technical--and largely meaningless--distinctions between the judgment below and the cases relied upon by petitioners as being in conflict with said judgment and by suggesting that the circumstances of this case are unlikely to recur.

Contrary to respondent's assurances, the judgment below is in conflict with decisions of this Court and other circuit courts of appeal. Furthermore, while the enactment of CAFA will decrease the number of parallel class actions existing in federal and state courts, it cannot fairly be said that the circumstances of this case will not recur, due to limitations and exceptions to the Act.

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explained throughout this federal proceeding, numerous attempts had been made to obtain earlier dates but were unsuccessful due to the need for more discovery and the busy schedules of all counsel involved as well as the trial court. Petitioners do not believe that this argument deserves any further attention.

[2] GETTYSBURG (Turner Pictures 1993) (Brig. Gen. James L. Kemper to Maj. Gen. George E. Pickett: "Well, I got to hand it to you, George. You sure got a talent for trivializing the momentous and complicating the obvious. You ever consider running for Congress?").

A. The Judgment Below Creates or Adds to Important Conflicts That Warrant this Court's Review

1. Conflict Is Not Avoided by Finding of Adequate Representation

Respondent argues that the Eighth Circuit's judgment in this case does not conflict with any of the decisions cited by petitioners that discuss personal jurisdiction and due process concerns because there was a finding of adequate representation in this case by the district court.[3] Petitioners have asserted that the Eighth Circuit's ruling on this issue conflicts with this Court's recent decision in *Taylor v. Sturgell*,[4] as well as the pre-*Taylor* decisions of the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*,[5] and the Eleventh Circuit in *In re Bayshore Ford Trucks Sales, Inc.*[6] (Pet. at 20-31).

Respondent argues that the Eighth Circuit's judgment below does not conflict with this Court's decision in *Taylor* because of this Court's recognition therein that "properly conducted class actions" are among the recognized exceptions to the rule against

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[3] *See In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716, 725 (8th Cir. 2010). Pet. App. at 15a.

[4] 553 U.S. 880, 128 S.Ct. 2161, 2171-73 & 1276 (2008).

[5] 134 F.3d 133, 141 (3d Cir. 1998).

[6] 471 F.3d 1233, 1245 (11th Cir. 2006).

nonparty preclusion.[7] This argument misses the point. The Court in *Taylor* acknowledged that "properly conducted class actions" were a recognized exception to the rule against nonparty preclusion because of "the procedural safeguards contained in Federal Rule of Civil Procedure 23."[8] Adequate representation is only one of the procedural safeguards afforded under Rule 23; additional safeguards include rights to notice, an opportunity to be heard or participate in the litigation (whether in person or through counsel), and the right to opt out or request exclusion. These procedural safeguards are only afforded class members upon certification of a class.[9]

Simply stated, an individual lawsuit requesting class certification does not become a "properly conducted class action" at least until class certification has been granted in accordance with the requirements set forth in Rule 23. As noted in the petition, the Court of Appeal for the Second District of California has recognized this exact point, albeit in *dicta*, in *Johnson v. GlaxoSmithKline, Inc.*[10] (Pet. at 28-29). This point has also now been recognized by the American Law Institute ("ALI") in its *Principles of the*

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[7] Brief in Opp. at 13.

[8] *Taylor*, 553 U.S. at 892-96 & 900-01, 128 S.Ct. at 2171-73 & 2176.

[9] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); Fed.R.Civ.P. 23; W.Va.R.Civ.P. 23.

[10] 83 Cal.Rptr.3d 607, 618 n. 8 (Ct. App. 2d Dist. 2008).

Law of Aggregate Litigation § 2.11 (2010).[11] The ALI now suggests that principles of comity, rather than preclusion, should affect a forum court's discretion as to whether to follow a prior court's denial of class certification when dealing with the same or similar class-certification question.[12] As explained, in part, in Comment b:

> The choice of comity rather than preclusion as the focus of this Section stems from the difficulties associated with the latter with respect to a denial of class certification. The major difficulty arises from the recognition that, as to such a denial, the prospective absent class members have become neither parties to the proposed class action nor persons with any attributes of party status (such as the capacity

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[11] This version of the section was adopted and promulgated by the ALI on May 20, 2009, and now provides: "A judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity."

[12] While petitioners do not agree with the adoption of the rebuttable presumption suggested by the ALI, the acknowledgment that principles of comity rather than preclusion should guide a forum court's discretion seems much more consistent with this Court's pronouncements that under the Anti-Injunction Act, 28 U.S.C. § 2283, "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." *Atl. Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 286-87 (1970). *Accord Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-50 (1988); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229-30 (1922).

> to be bound thereby, as in a duly certified class action). Nor is there any guarantee that prospective absent class members even would be aware of the court's determination of their ability to assert claims as a class action. The notion that absent class members could be bound in an issue-preclusion sense with respect to the seeking of certification in another court, even for the same proposed class action, runs afoul of existing precedents that confine to certain narrowly defined categories the situations in which preclusion can be extended to reach nonparties. Issue preclusion arising from a denial of class certification as to would-be absent class members would approach the kind of "virtual representation" disallowed under current law.

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further explained in the Reporters' Note to Comment b:

> On the rejection of "virtual representation" as a basis for preclusion of nonparties, *see Taylor v. Sturgell*, 128 S.Ct. 2161 (2008). There, the Supreme Court observed that "the rule against nonparty preclusion is subject to exceptions." *Id.* at 2172. The Court hastened to underscore, however, that those exceptions "delineate discrete" situations that "apply in 'limited circumstances,'" *id.* at 2175 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n. 2 (1989)), none of which extend generally to the situation

> of a would-be absent class member with respect to a denial of class certification.
>
> Informed by the *Taylor* Court's analysis of the outer bounds for nonparty preclusion, this Section rejects the *Bridgestone / Firestone* court's pre-*Taylor* view of the issue-preclusive effect that may properly flow from a denial of class certification. Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone / Firestone* represented the minority view within the federal circuits . . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010) (citations omitted).

Respondent's argument that the Eighth Circuit's judgment below also is not inconsistent with the pre-*Taylor* decisions of the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, *supra*, and the Eleventh Circuit in *In re Bayshore Ford Trucks Sales, Inc.*, *supra*, is a red herring because neither of those courts held that their relevant holdings, based upon due process and lack of personal jurisdiction, were solely dependent upon a finding of inadequate representation, or the absence of a finding of adequate representation, as opposed to any other basis for denying a class action under Fed.R.Civ.P. 23.[13] Furthermore, it must be stressed in

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[13] *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 139 & 141 (noting that certification of settlement class had been overturned due to failure of district court to make any of the findings required under Rule 23, including adequacy of representation, but only expressing doubt as to district court's ability to find commonality, typicality, and

this case that the district court never made an express finding of adequate representation in its decision denying class certification in *McCollins*, rather it merely presumed adequate representation existed for purposes of its discussion. The district court should not be permitted, when addressing the motion for an injunction, to make a *post hoc* judgment as to such a critical issue.[14]

2. Conflict Is Not Properly Avoided by Enmeshing Substantive Ruling in Procedural Ruling Denying Class Certification

Petitioners contend that the Eighth Circuit's judgment below conflicts with decisions recognizing that the doctrine of collateral estoppel may not be used under the Relitigation Exception to the Anti-Injunction Act to preclude a forum court from exercising the right and discretion to apply its own procedural rules in a

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predominance requirements; not basing its finding of lack of personal jurisdiction on any precise reason for denial of class treatment); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d at 1245 (although inadequate representation was reason for denial of class treatment by district court, appellate court did not base its finding of lack of personal jurisdiction on this particular reason for denial of class treatment; also citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, *supra*, as support for holding).

[14] *See Chick Kam Choo*, 486 U.S. at 148. (cautioning that a district court is not permitted to render a *post hoc* judgment as to what an earlier order should have said).

manner different from its federal counterparts.[15] (Pet. at 7-19). Recognizing these authorities and the well-established legal principles espoused therein, respondent and the courts below have attempted to distinguish this case by arguing that the district court's procedural denial of class certification was enmeshed with a substantive ruling regarding the requirements under West Virginia law for proving proximate causation.[16] For reasons explained in the petition, this argument of respondent and the courts below misinterpret the proper consideration of substantive issues by a court when making a Rule 23 determination. (Pet. at 17-19). Adopting the approach advanced by respondent and the courts below would have the effect of essentially emasculating the above stated legal principles and authorities because a trial court must be aware of and consider the substantive law and issues in examining nearly every requirement for class-action treatment made under Rule 23.

---

[15] *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 148-49 (*forum non conveniens* doctrine); *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996) (class action rule); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146 (same); *Allen v. Stewart Title Guar. Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 (E.D. Pa. Mar. 20, 2007) (same).

[16] Respondent also argues that the circuit court decisions discussed by petitioners involved class-certification denials that were not yet sufficiently final to be afforded preclusive effect. While it is true that those circuit courts did indeed so rule, they did not limit their holdings to that ruling. *See J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d at 179-80 (also noting that final judgment was entered during pendency of appeal); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146.

Petitioners also note that the ALI in its *Principles of the Law of Aggregate Litigation* § 2.11 (2010), has also acknowledged the above cited legal authorities as a reason for its rejection of preclusion principles. As explained, in part, in Comment b:

> Apart from the further due-process limitations, issue preclusion itself requires that the same issue must have been litigated and determined in the proceeding that produced the adjudication now said to have preclusive effect. The same-issue requirement is relatively strict, calling for litigation and determination in the initial proceeding not simply of the same kind of issue concerning the appropriateness of aggregation but, rather, the identical issue. Same-issue status is not present when the aggregation question in the first proceeding arose under a procedural rule of the rendering court and the aggregation question in the subsequent proceeding arises under a procedural rule—albeit, perhaps, an identically phrased rule—that need not be interpreted or applied in identical fashion. Issue preclusion is generally not appropriate in such a situation, for the court in the subsequent proceeding must have the opportunity, if it chooses, to construe its procedural rule differently on the aggregation question, within the ambit afforded by federal constitutional due process. . . .

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further stated in the Reporters' Note to Comment b:

> Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone / Firestone* represented the minority view within the federal circuits, with other courts emphasizing the stringency of the same-issue requirement for issue preclusion. *See J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *accord In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (citing with approval *Clearwater*). . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010) (citations omitted).[17]

3. The Enactment of CAFA Does Not Ensure that these Circumstances Will Not Recur

While it cannot be disputed that CAFA substantially enlarges the scope of a district court's original and removal jurisdiction regarding class actions, it cannot be accurately predicted to what

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[17] *See also* 25 No. 2 Federal Litigator 4 (discussing Eighth Circuit's decision in this case and acknowledging, in part: "It is unusual for a federal court, having declined to certify a class, to enjoin members of the proposed class from seeking certification in separate litigation in state court. . . . More typical is the federal court's refusal to issue an injunction. [Citing circuit court decisions relied upon by petitioners] . . . This decision and *Bridgestone / Firestone* recognize the potential availability of an injunction to block a certification attempt in state court following a federal court's denial of certification. Realistically, though, the chances of obtaining an injunction are not good." (citations omitted)).

extent its enactment diminishes the odds of these circumstances recurring. CAFA, itself, provides for discretionary and mandatory remand under certain circumstances.[18] Furthermore, consistent with prior law, courts have held that Congress, when adopting CAFA, did not intend to permit removal when requests for class certification are contained in counterclaims, cross claims, and third-party complaints.[19]

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[18] 28 U.S.C. §§ 1332(d)(3) & (d)(4)(A) & (B). *See Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 810-12 (5th Cir. 2007). *See also Luther v. Countrywide Home Loans Servicing L.P.*, 533 F.3d 1031 (9th Cir. 2008) (holding that CAFA did not trump specific bar to removal of cases arising under Securities Act of 1933, 15 U.S.C. § 77v(a)).

[19] *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 331-36 (4th Cir. 2009); *First Bank v. DJL Props., LLC*, 598 F.3d 915, 916-18 (7th Cir. 2010); *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017-18 (9th Cir. 2007).

II. PRAYER FOR RELIEF

For all of the foregoing reasons as well as those stated in the petition, petitioners respectfully pray that Your Honorable Court grant their petition for writ of certiorari and reverse the opinion and judgment of the Eighth Circuit Court of Appeals.

Respectfully Submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 12 2010
OFFICE OF THE CLERK

No. 09-1205

In the Supreme Court of the United States

KEITH SMITH and SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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November 12, 2010

Petition for Writ of Certiorari filed April 5, 2010
Petition for Writ of Certiorari granted September 28, 2010

Supreme Court, U.S.
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Relevant Docket Entries United States District Court for the District of Minnesota, No. 01-md-01431-MJD, *In Re: Baycol Prods. Litig.* . . . . . JA 4

Relevant Docket Entries United States Court of Appeals for the Eighth Circuit, No. 09-1069, *Smith, et al. v. Bayer Corp.* . . . . JA 5

Motion to Remand, *McCollins, et al. v. Bayer Corp., et al.*, No. 02-CV-0199 (D. Minn. Nov. 1, 2006) [DE 48] . . . . . JA 8

Defendants' Cross-Motion to Deny Class Certification and Enter Judgment Against Plaintiff, *McCollins, et al. v. Bayer Corp., et al.*, No. 02-CV-0199 (D. Minn. Jan. 10, 2007) [DE 49] . . . . . JA 13

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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RELEVANT DOCKET ENTRIES

United States District Court
for the District of Minnesota

No. 02-cv-0199-MJD-SRN

McCollins, et al. v. Bayer Corp., et al.

* * *		
11/01/2006	48	MOTION to Remand by Peggy Ann Mays, George F McCollins. (akl) (Entered: 11/01/2006)
01/10/2007	49	Cross MOTION to Deny Class Certification and Enter Judgment Against Plaintiff by Bayer Corporation. (akl) (Entered: 01/11/2007)
01/10/2007	50	RESPONSE re 49 Cross MOTION to Deny Class Certification and Enter Judgment Against Plaintiff filed by Bayer Corporation, Smithkline Beecham Corporation. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 LR7.1 Word Count Compliance Certificate)(akl) (Entered: 01/11/2007)
06/11/2007	51	REPLY to Response to Motion re 48 MOTION to Remand and Opposition to Bayer and GSK's Cross-Motion to Deny Class Certification and Enter Judgement Against Plaintiff filed by George F McCollins. (akl) Modified text on 6/11/2007 (akl). (Entered: 06/11/2007)

* * *		
12/21/2007	53	REPLY to Response to Motion re 49 Cross MOTION to Deny Class Certification and Enter Judgment Against Plaintiff filed by Bayer Corporation, Smithkline Beecham Corporation. (akl) (Entered: 12/27/2007)
08/25/2008	54	MEMORANDUM OF LAW & ORDER: 1. Plaintiff's Motion to Remand is DENIED; 2. Bayer and GSK's CrossMotion to Deny Class Certification and Enter Judgment Against the Plaintiff is GRANTED. This matter is DISMISSED WITH PREJUDICE. Signed by Chief Judge Michael J. Davis on 8/24/08. (akl) (Entered: 08/26/2008)
08/26/2008	55	JUDGMENT (Attachments: # 1 Civil-8th Circuit Pre-Hearing Conference Notice, # 2 Civil Notice - appeal)(akl) (Entered: 08/26/2008)
10/31/2008	56	Notice of Motion and Expedited MOTION for Permanent Injunction by Bayer Corporation. (akl) (Entered: 11/03/2008)
10/31/2008	57	MEMORANDUM in Support re 56 Expedited MOTION for Permanent Injunction filed by Bayer Corporation. (Attachments: # 1 Exhibits A-C, # 2 Exhibits D-E, # 3 Exhibit F, # 4 Exhibits G-I, # 5 Exhibits J-N)(akl) (Entered: 11/03/2008)
* * *		

11/17/2008	59	MEMORANDUM in Opposition re 56 MOTION for Permanent Injunction filed by Keith Smith, Shirley Sperlazza. (Attachments: # 1 LR7.1 Word Count Compliance Certificate, # 2 Certificate of Service)(akl) (Entered: 11/17/2008)
11/24/2008	60	REPLY to Response to Motion re 56 MOTION for Permanent Injunction filed by Bayer Corporation. (akl) (Entered: 11/24/2008)
* * *		
12/09/2008	63	MEMORANDUM OF LAW & ORDER granting 56 Motion for Permanent Injunction. Keith Smith and Shirley Sperlazza are permanently enjoined from seeking certification of an economic loss class of West Virginia Baycol purchasers in the lawsuit styled Keith Smith, et al. v. Bayer Corporation, et al., No. 01C191 (Cir. Ct. Brooke co., W. Va.). Signed by Chief Judge Michael J. Davis on 12/9/08. (akl) (Entered: 12/09/2008)
* * *		
01/06/2009	66	NOTICE OF APPEAL TO 8TH CIRCUIT as to 63 Order on Motion for Permanent Injunction by Keith Smith, Shirley Sperlazza. (Attachments: # 1 COA - Form A, # 2 COA - Form B, # 3 Certificate of Service)(akl) (Entered: 01/07/2009)
* * *		

United States District Court
for the District of Minnesota

No. 01-md-01431-MJD

In Re: Baycol Prod. Litig.

* * *

11/22/2002	3325	PRETRIAL ORDER NO 51 (Judge Michael J. Davis / 11/22/02) in re: Settlement/Mediation program 2pg(s) (Posted to Verilaw cc: all counsel) ((Entered: 11/22/2002)
02/13/2003	3389	PRETRIAL ORDER NO 63 (Judge Michael J. Davis 2/13/03) Members of the Liaison Advisory Committee of this Court have submitted a protocol for inclusion in a pretrial order. This Court has reviewed the proposed protocol and incorporates such protocol herein. 7pg(s) (Posted to Verilaw cc: all counsel) (Modified on 02/14/2003 (Entered: 02/14/2003)
02/23/2004	3816	The parties' STATUS REPORT and proposed agenda, February 24, 2004. (LJD) (Entered: 02/26/2004)
11/10/2008	4262	JOINT STATUS REPORT. (akl) (Entered: 11/12/2008)

* * *

United States Court of Appeals
for the Eighth Circuit

No. 09-1069

Smith, et al. v. Bayer Corp.

* * *

01/22/2009 DESIGNATION of record filed by Appellants Mr. Keith Smith and Ms. Shirley Sperlazza. w/service 01/22/2009 [3509423] [09-1069] (CML)

* * *

01/30/2009 DESIGNATION of record filed by Appellee Bayer Corporation. w/service 01/30/2009 [3512301] [09-1069] (JH)

* * *

03/04/2009 RECORD FILED - Record Part: APLNT/PET APPENDIX, No. of Volumes: 2 [3523238] [09-1069] (MDS)

03/05/2009 BRIEF FILED - APPELLANT BRIEF filed by Mr. Keith Smith and Ms. Shirley Sperlazza , w/service 03/03/2009 48 PDF pages, w/Addendum 10 copies. Words/lines/pages 9804 words. Appellee/Responsive brief of Bayer Corporation due on 04/02/2009.. ,

[3523728] [09-1069] (MDS)

04/03/2009 BRIEF FILED - APPELLEE BRIEF filed by Bayer Corporation, w/service 04/02/2009 62 PDF pages, No Addendum 10 copies. Words/lines/pages 11,666 words. Reply brief of Keith Smith and Shirley Sperlazza due on 04/16/2009., [3533707] [09-1069] (MDS)

* * *

04/21/2009 BRIEF FILED - APPELLANT REPLY BRIEF filed by Mr. Keith Smith and Ms. Shirley Sperlazza ,. w/service 04/20/2009 35 PDF pages, No Addendum 10 copies. Words/lines/pages6983 words. , [3539262] [09-1069] (MDS)

* * *

11/17/2009 ARGUED & SUBMITTED in St. Paul to Judges Diana E. Murphy, Lavenski R. Smith, Duane Benton. Mr. Richard Allen Monahan for Appellants Mr. Keith Smith and Ms. Shirley Sperlazza and Mr. Philip S. Beck for Appellee Bayer Corporation. Rebuttal by Mr. Richard Allen Monahan for Mr. Keith Smith and Ms. Shirley Sperlazza RECORDED [3609796] [09-1069] (KLP)

01/05/2010	OPINION FILED - THE COURT: DIANA E. MURPHY, LAVENSKI R. SMITH and DUANE BENTON. Diana E. Murphy, Authoring Judge (PUBLISHED) [3620930] [09-1069] (DMS)
01/05/2010	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. DIANA E. MURPHY, LAVENSKI R. SMITH and DUANE BENTON Hrg Nov 2009 [3620932] [09-1069] (DMS)
02/01/2010	MANDATE ISSUED. [3630073] [09-1069] (CMD)

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
Case No: 02-CV-199

[Filed November 1, 2006]

In Re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
GEORGE F. MCCOLLINS, individually, and on behalf of all others similarly situated,	)
	)
Plaintiff,	)
	)
v.	)
	)
BAYER CORPORATION, a foreign corporation authorized to do business in West Virginia; BAYER AG, a foreign corporation; and GLAXOSMITHKLINE plc, a foreign corporation,	)
	)
Defendants.	)

PLAINTIFF'S MOTION FOR REMAND

Now comes the Plaintiff, individually and on behalf of all others similarly situated (hereinafter "Class"), by and through counsel, Bell & Bands, PLLC, and respectfully moves for an Order of transfer of this putative class action to the transferor Court, the Southern District of West Virginia. In the alternative,

Plaintiff requests that the Court establish a briefing schedule for the issue of class certification to be decided by this Court. In support, the Plaintiff states as follows:

1. In this action, the Plaintiff seeks damages under applicable West Virginia law for himself and the putative Class in the nature of a refund for the economic loss caused by Defendants' breach of express and implied warranties and violation of the West Virginia Consumer Credit and Protection Act. The Class consists of: "[i]ndividuals who have at any time purchased Baycol in West Virginia from when Baycol was initially placed on the market in the United States until the present."

2. Under Pretrial Order No. ("PTO") 149, the parties were directed to engage in case-specific discovery. In this regard, the Court established various discovery deadlines for Phase I through Phase IV cases. The current action is a Phase I case (D. Minn. Nos. 01-2383 thru 03-1173).

3. In terms of case-specific discovery, the Defendants have deposed the Class Plaintiff, George F. McCollins. In addition, Defendants have deposed Mr. McCollins' treating physician who prescribed him Baycol. No other case-specific discovery has taken place.

4. Notably, according to PTO 149 § I.C.1.h, the last deadline for case-specific discovery is November 29, 2006, of which Phase I Plaintiffs have until such date to complete the depositions of any case-specific experts identified by Defendants.

5. Here, the Defendants did not disclose any case-specific experts. Accordingly, unless otherwise directed by the Court, case-specific discovery is closed in the current action.

6. Under PTO 149 § VI, no case shall be eligible for remand to its transferor court unless:

- Plaintiff's Fact Sheet is substantially complete and all identified deficiencies have been corrected;
- Plaintiff has executed all appropriate authorizations, including HIPAA-compliant authorizations, as requested by defendants;
- Case-specific fact and expert discovery has been completed;
- The Court has ruled upon *Daubert* motions directed to generic experts and any additional pending motions affecting the case; and
- For a rhabdomyolysis case, mediation has been conducted.

7. In the case at bar, when considering the above criteria and the fact this is a putative class action, the Court should remand the case or establish a briefing schedule for the issue of class certification.

8. First, Plaintiff's Fact Sheet has been completed and there are no outstanding deficiencies. Second, Plaintiff has executed all authorizations provided by Defendants. Third, case-specific fact and expert discovery has been completed. Fourth, the mediation requirement is not applicable because this is not a rhabdomyolysis case. Lastly, although the Court has not ruled upon the *Daubert* motions directed to any generic experts, remand and the issue of class

certification should not be delayed pending a ruling on the *Daubert* motions. Indeed, the prior ruling in September 2003 on whether a national Baycol class should be certified in the MDL demonstrates that a final ruling on the *Daubert* motions is not dispositive or necessary to the class certification determination. Similarly, a final ruling on the *Daubert* motions is not dispositive or necessary to class certification determination in the case at bar. Therefore, the Court should remand the case to the transferor Court.

9. Moreover, to eliminate concerns about the pending *Daubert* motions, if the case is remanded to the transferor Court, the transferor Court can resolve the class certification issue while staying all other issues until a final ruling has been made on the *Daubert* motions by this Court.

WHEREFORE, the Plaintiff respectfully requests the Court enter an Order of transfer of this class action to the transferor Court, the Southern District of West Virginia or establish a briefing schedule for the issue of class certification to be decided by this Court.

Respectfully submitted this the 1st day of November, 2006.

George F. McCollins, individually, and on behalf of all others similarly situated,
By Counsel

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* * *

[*Certificate of Service Omitted in Printing of this Appendix*]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed January 10, 2007]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Michael Black, et al. v. Bayer Corp., et al.	)
	)

DEFENDANTS' CROSS-MOTION TO DENY CLASS CERTIFICATION AND ENTER JUDGMENT AGAINST PLAINTIFF

Pursuant to Federal Rules of Civil Procedure 23 and 56, defendants hereby move the Court to deny class certification and to enter judgment against the plaintiff and in favor of defendants on all claims in this matter. This Motion is based on all files, records and proceedings herein, including Defendants' Response To Motion For Remand, And Cross-Motion To Deny Class Certification And Enter Judgment Against Plaintiff (which encompasses Defendants' brief in of support of this motion).

Dated: January 10, 2007

Respectfully submitted,

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* * *

[*Certificate of Service Omitted in Printing of this Appendix*]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed January 10, 2007]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Michael Black, et al. v. Bayer Corp., et al.	)
	)

BAYER AND GSK'S RESPONSE TO MOTION FOR REMAND AND CROSS-MOTION TO DENY CLASS CERTIFICATION AND ENTER JUDGMENT AGAINST PLAINTIFF

Plaintiff George McCollins'[1] motion to remand is premature. No case should be recommended for transfer until, among other things, this Court has entered its *Daubert* rulings, which will apply to all plaintiffs in this MDL. However, defendants have no objection to the alternate relief requested by Mr. McCollins: prompt consideration by this Court of his class allegations. Accordingly, defendants move for

[1] This case originally involved three plaintiffs. The amended complaints filed in 2001 and 2003 omitted plaintiff Peggy Ann Mays. Plaintiff Michael Black was dismissed with prejudice by this Court on January 14, 2005.

denial of class certification. *See In re Old Kent Mortgage Co. Yield Spread Premium Litig.*, 191 F.R.D. 155, 162 (D. Minn. 2000) (recognizing that "[a]ny party may move for a class determination under Rule 23(c)(1)") (citing Wright & Miller)).

Plaintiffs are not entitled to serial relitigation of class certification issues. *See* PTO 4 § IV.E (requiring plaintiffs to file any motion and supporting brief seeking class certification in 2002). This Court ruled, in denying certification of the master class action complaint, that economic loss claims like the ones asserted by Mr. McCollins, cannot be litigated on a classwide basis because individual issues of fact predominate – a holding that applies equally to statewide and nationwide classes. *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 213-14 (D. Minn. 2003). The evidentiary record in this case confirms the correctness of that ruling.

Moreover, judgment should be entered against Mr. McCollins individually. Mr. McCollins has asserted claims for economic loss based on his use of Baycol. However, his testimony and that of his physician demonstrate that Mr. McCollins did not sustain an economic loss related to his use of Baycol because Mr. McCollins benefited from and was not injured by Baycol. Specifically, his physician testified that:

- Baycol was "safe and effective in Mr. McCollins," Dep. of W. Michael Skeens (Ex. A) at 86:8-13;

- Mr. McCollins' use of Baycol was not associated with any side effects, *see id.* at 78:12-79:2; and

- Baycol "was perfect for [Mr. McCollins]," *id.* at 77:18.

Thus, there is no reason this case should be returned to the district in which it was filed. Rather, this Court should enforce its master class certification ruling by denying certification of the putative class and should enter judgment against plaintiff McCollins.

STATEMENT OF FACTS AND OF THIS CASE

A. Mr. McCollins' Successful Use of Baycol

Mr. McCollins was first diagnosed with high cholesterol in December 1992. *See* Skeens Dep. (Ex. A) at 12:13-21; McCollins Medical Records (Ex. B) MS000207gfm.; *see also* Dep. of George McCollins (Ex. C) at 57:15-58:3, 134:22-135:4, 155:4-7 (describing plaintiff's history of high blood pressure which pre- and postdates his Baycol use). Efforts to treat his high cholesterol through lifestyle changes did not work. *See* Skeens Dep. (Ex. A) at 76:12-78:22; McCollins Medical Records (Ex. B) MS000149-152gfm. Accordingly, Mr. McCollins was prescribed the 20 mg. dose of Pravachol (another statin) in August of 1993. Skeens Dep. (Ex. A) at 79:3-6, 80:6-21, 81:5-18; McCollins Medical Records (Ex. B) MS000147-148gfm. Plaintiff's physician, W. Michael Skeens, M.D., told plaintiff to notify him if he had any muscle pain on the drug. Skeens Dep. (Ex. A) at 82:2-11, 86:20-87:3.

In November of 1994, Mr. McCollins went to the emergency room complaining of leg pain and saw Dr. Skeens for follow-up care several days later. *See id* at 88:7-21; McCollins Medical Records (Ex. B) SMH000031gfm, MS000117-18gfm. Mr. McCollins had

"stopped taking his Pravachol because of the fact that this can cause myositis and he was aware of this." Skeens Dep. (Ex. A) at 88:22-89:19; *see id.* at 29:7-33:8, 49:23-51:12 (discussing removal from Pravachol); McCollins Dep. (Ex. C) at 89:16-90:17 (same).

Around October 1995, Mr. McCollins was prescribed Zocor. *Id.* at 92:16-93:16; McCollins Medical Records (Ex. B) MS000103gfm. While taking Zocor, Plaintiff reported mild edema and thigh cramping. *See* McCollins Medical Records (Ex. B) MS000091-93gfm, MS000078-79gfm.

In April 2001, Dr. Skeens switched Mr. McCollins from Zocor to the 0.4 mg. dose of Baycol because Mr. McCollins' insurance no longer covered Zocor. *See* McCollins Dep. (Ex. C) at 100:5-101:21, 159:20-160:6; McCollins Medical Records (Ex. B) MS0000029-31gfm. Dr. Skeens testified that his decision to prescribe Baycol was based on his professional medical judgment and with awareness of the drug's potential side effects. Skeens Dep. (Ex. A) at 34:5-14, 37:12-23, 38:3-9, 75:1-3.

During the time Mr. McCollins took Baycol, his cholesterol and LDL levels remained within the normal range. *See id.* at 78:17-79:20; McCollins Medical Records (Ex. B) CHH000015gfm, MS000163gfm. Dr. Skeens testified, to a reasonable degree of medical certainty, that ***Baycol was "safe and effective in Mr. McCollins."*** Skeens Dep. (Ex. A) at 86:8-13 (emphasis added). At no time were any side effects associated with Baycol identified in Mr. McCollins. *See id.* at 78:12-79:2. Dr. Skeens concluded that the drug "was perfect for [Mr. McCollins]." *Id.* at 77:18.

Mr. McCollins complains that he experienced leg cramps and abdominal pain while taking Baycol. McCollins Dep. (Ex. C) at 70:13-22, 149:12-19. However, no medical testimony links these ailments to Mr. McCollins' use of Baycol. To the contrary, the medical records and testimony of Mr. McCollins' own physician establishes that certain ailments Mr. McCollins suffered while taking Baycol were caused by prostatitis and medication Mr. McCollins was taking for prostatitis.[2] Further, Mr. McCollins conceded that he had sought treatment for leg cramps before he ever took Baycol. McCollins Dep. (Ex. C) at 180:11-22.

On August 9, 2001, Dr. Skeens called Mr. McCollins to switch him to Lipitor for the sole reason that Baycol had been withdrawn from the market. Skeens Dep. (Ex. A) at 80:7-14, 82:4-8, 84:9-13; McCollins Medical Records (Ex. B) MS000019gfm.

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[2] Specifically, on or about July 19, 2001, Dr. Skeens observed that Mr. McCollins had low back pain. Skeens Dep. (Ex. A) 79:16-18. A week later, Dr. Skeens saw Mr. McCollins again, finding that the pain radiated around to plaintiff's left testicle; in the interim, Mr. McCollins had been diagnosed with prostatitis. *Id.* at 79:19-80:14 (testifying none of the problems suggested that Baycol was involved in any way); *see also* McCollins Dep. (Ex. C) at 64:14-65:15 (prostate problems began decades before and were continuing); McCollins Medical Records (Ex. B) TCS000015gfm (July 16, 2001, medical record regarding prostate complaints and detailing that secretions contained bacteria and other abnormalities). On July 25, 2001, plaintiff complained of abdominal pain; a CT showed the abdomen to be normal, but showed obstruction of the prostate. *See* McCollins Medical Records (Ex. B) CHH000018gfm, MS000212gfm. Furthermore, on August 6, 2001, Mr. McCollins' physician determined that a prostatitis medication, Levaquin, was making Mr. McCollins "very sick" to his stomach, and removed him from the drug. *See* McCollins Medical Records (Ex. B) MS000020gfm.

B. This Lawsuit

After seeing a newspaper advertisement for a lawyer pursuing Baycol-related claims, Mr. McCollins decided to file a lawsuit. McCollins Dep. (Ex. C) at 31:9-33:4. Mr. McCollins brings this action individually and on behalf of a putative class of plaintiffs who "purchased Baycol as a cholesterol lowering product in West Virginia." Compl. ¶ 1.

Although the governing Second Amended Class Action Complaint repeatedly alleges that Baycol caused users to suffer dangerous side effects, *see*, *e.g.*, *id.* ¶¶ 16-17, 19-31, 36(b), 51, 59, it disavows any recovery for personal injury, *id.* ¶ 34. Rather, the complaint seek damages for "economic loss" under a variety of state law theories. *See id.* ¶¶ 41-67 (breaches of warranty, unjust enrichment, deceptive trade practices); *id.* at 17 (seeking, *inter alia*, general, compensatory, consequential, punitive and exemplary damages, as well as attorneys' fees and refund of all purchase costs).

Mr. McCollins spent less than 35 dollars as his copayment to fill his Baycol prescription four times. McCollins Dep. (Ex. C), at 26:16-18, 28:4-11, 145:15-146:21; McCollins Medical Record (Ex. B) GFM000043gfm.

ARGUMENT

I. PLAINTIFF'S MOTION TO REMAND IS PREMATURE.

This case should not be remanded to the transferor court – now or ever. The case should not be remanded

now because pretrial proceedings before this Court are not complete. *See* 28 U.S.C. § 1407(a); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33 (1998). Specifically, the Court has not yet ruled on generic *Daubert* motions – a prerequisite for remand under PTO 149 § VI. Mr. McCollins cannot avoid this fact by suggesting, as he does, that this case be stayed after remand until this Court's *Daubert* orders have been entered. Pl.'s Mot. ¶ 9. If the case were remanded, this Court would lose jurisdiction to enter orders binding the case.

Moreover, the Court has not entered an order addressing defendants' motion to strike the testimony of plaintiff's putative case-specific expert, Dr. Gregory C. Clarke. *See* Case No. 02-0199, Document 47 at 4-5 (filed Sept. 26, 2006) (brief in support of motion). Defendants argued that Dr. Clarke offered no case-specific testimony and was actually a generic expert tendered out-of-time, in violation of PTO 120 ¶ 9. Mr. McCollins has conceded that motion by not contesting it.

However, even if the Court had entered orders on all of these motions, this case should not be remanded. The fairest and most efficient way to manage this litigation is for this Court to apply its own ruling on class certification issues. Further, the Court should not be remanding cases, such as this one, that can be decided through simple motion practice. This Court already knows the issues in this litigation and can address summary judgment motions expeditiously. Where, as here, plaintiff cannot establish a triable issue of material fact, court staffs should not be required to prepare and transfer files and transferor judges should not be required to invest significant time

learning litigation that will not survive summary judgment.

II. CLASS CERTIFICATION SHOULD BE DENIED.

This Court already has ruled, in denying certification of the master class action complaint, that economic loss claims cannot be litigated on a classwide basis. *In re Baycol Prods. Litig.*, 218 F.R.D. at 213-14. The fact that plaintiff here purports to represent a statewide class makes no difference because this Court held, among other things, that individual issues of fact (as well as differences in state law) bar certification. *Id.* at 214 ("Individual issues predominate, rendering class certification unwarranted"). Indeed, the evidence in this action confirms that this Court was correct in denying certification of economic loss claims.

A. Plaintiff's Class Allegations Should Be Stricken as a Matter of Law.

Plaintiff's class claims cannot go forward as a matter of law and should therefore be stricken. *See In re Old Kent Mortgage Co. Yield Spread Premium Litig.*, 191 F.R.D. 155, 162-64 (D. Minn. 2000) (granting motion to strike class allegations). *See also Thompson v. Merck & Co.*, Nos. C.A. 01-1004 *et al.* 2004 WL 62710, at *2 (E.D. Pa. Jan. 6, 2004) (granting motion to strike before plaintiff had moved for certification because it was "clear" from the complaints and evidence that plaintiff could not satisfy Rule 23 and "[n]o amount of additional class discovery will alter this conclusion"); *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 674 (D. Kan. 2004) (recognizing that under Rule 23 a motion to strike can be used to "test

the viability of a class at the earliest pleading stage of the litigation") (collecting cases). *See generally General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982) ("[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named Plaintiff's claim").

This Court already has ruled that economic loss claims cannot be litigated on a classwide basis because individual issues of fact predominate. *See In re Baycol*, 218 F.R.D. at 213-14. Specifically, the Court recognized that the viability of such a claim depends on "whether a patient received their money's worth from Baycol," and to prevail "[p]laintiffs would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any health benefits." *Id.*; *see id.* at 213 (recognizing "one would have to know whether or not [plaintiffs] suffered any injury") (internal quotation omitted). As this Court has recognized, these showings are individualized, multi-faceted, and predominant, "rendering class certification unwarranted." *Id.* at 214. *See also In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 68-69 (S.D.N.Y. 2002) (denying class certification as to economic injury class given the predominance of individual issues).

Plaintiff cannot avoid this holding by asserting that his economic loss claims (breach of express and implied warranty, unjust enrichment, and violation of West Virginia consumer protection law, W. Va. Code § 46A-6-101 *et seq.*) arise under West Virginia law. To recover under any of these theories, plaintiffs must show an actual injury proximately caused by the defendant – the precise requirement that this Court found to be

highly individualized and a bar to class certification. *See City Nat'l Bank of Charleston v. Wells*, 384 S.E.2d 374, 382 (W. Va. 1989) (requiring proximately caused injury for breach of warranty); *Bertovich v. Advanced Brands & Importing, Co.*, No. 5:05CV74, 2006 WL 2382273, at *4-5 (N.D.W. Va. Aug. 17, 2006) (recognizing plaintiff's consumer protection act, unjust enrichment, negligence and other West Virginia claims all required proof of "an actual injury to a legally protected interest"); W. Va. Code § 46A-6-106 (requiring ascertainable loss of money or property resulting from prohibited or unlawful practice). Accordingly, without even turning to the evidence of this case, it is clear that this lawsuit cannot go forward as a class action.

B. The Evidence Confirms that Individual Issues of Fact Predominate.

The testimony of Mr. McCollins and his doctor, and Mr. McCollins' medical records further support the conclusion that class certification must be denied. That evidence demonstrates the predominance of individual facts as to whether Baycol benefited and/or allegedly harmed any particular individual.

1. Efficacy. To determine whether Baycol worked for any individual, it is necessary to consider that particular plaintiff's medical history. *See, e.g.*, Skeens Dep. (Ex. A) at 20:5-7 (testifying that "every patient has to be evaluated on an individualized basis" to determine whether statin therapy is appropriate).

Mr. McCollins was diagnosed with high cholesterol in December 1992 (total 288, LDL 198). *See id.* at 12:13-21, 13:11-14:17. During the time Mr. McCollins

took Baycol, his cholesterol, HDL and LDL levels remained within normal range. *See id.* at 76:10-79:20; McCollins Medical Records (Ex. B) CHH000015gfm, MS000163gfm. After approximately one month on Baycol, Mr. McCollins' LDL was 112, "one of the better LDLs that he had [while being treated for high cholesterol]." Skeens Dep. (Ex. A) at 76:12-23. Thus, for Mr. McCollins, "Baycol helped." *Id.* at 77:19-20. Indeed, Dr. Skeens testified, to a reasonable degree of medical certainty, that Baycol not only was "safe and effective in Mr. McCollins," but "*was perfect for [him].*" *Id.* at 86:8-13,77:18 (emphasis added).[3]

Mr. McCollins does not dispute that Baycol worked for him. *See* McCollins Dep. (Ex. C) at 111:11-113:6 (testifying he had "no idea" as a layperson whether Baycol worked for him, and deferring to the medical records regarding his cholesterol); *id.* at 158:16-159:1 (deferring to a physician on whether Baycol was a "good drug"). Mr. McCollins' history demonstrates that determinations as to whether Baycol helped a particular individual can only be made on a case-by-case basis.

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[3] Even if a patient's response to Baycol had not been as dramatic as in Mr. McCollins' case, it would be necessary to examine an individual's medical history to determine whether Baycol was helpful in light of that history. Even if the medicine had not brought cholesterol within target ranges, it might be effective in a patient with a history of high cholesterol that was not responsive to other medicines or, as here, a history of adverse reactions to other statins. *E.g.*, McCollins Dep. (Ex. C) at 89:16-90:17 (ceased use of another statin when leg pain occurred because he "thought maybe [Pravachol] was causing my problem").

2. ***Alleged injury.*** Any inquiry into whether Baycol caused physical injury in a particular plaintiff also is individualized and, as Mr. McCollins' case demonstrates, requires examination of the individual's pre-existing conditions, prior statin reactions, the individual plaintiff's and learned intermediary's knowledge of potential side effects associated with statins, the warnings the intermediary provided about such side effects, and what the patient's medical records reflect about his or her reactions to Baycol.

For example, whereas Mr. McCollins asserts that he experienced leg cramps and abdominal pain while taking Baycol, *see* McCollins Dep. (Ex. C) at 70:13-22, 149:12-19, he testified that, prior to taking Baycol, he had "suffered from leg cramps" and "had actually sought medical treatment for leg cramps," *id.* at 180:11-182:11; *see* McCollins Medical Records (Ex. B) MS000117-118gfm (reporting leg pain while on Pravachol), MS000078-79gfm (thigh cramping while on Zocor). Similarly, Mr. McCollins had prostatitis that triggered aching and discomfort, and his various prostate conditions and their symptoms preceded his Baycol use by decades. *See, e.g.*, McCollins Dep. (Ex. C) at 64:14-65:15; McCollins Medical Records (Ex. B) MS000021-22gfm. Furthermore, Mr. McCollins had pre-existing degenerative joint disease and lumbar disc disease that caused him back pain before he had ever taken Baycol. *See* McCollins Dep. (Ex. C) at 65:16-19; Skeens Dep. (Ex. A) at 79:3-11; McCollins Medical Records (Ex. B) MS000029-31gfm (detailing pre-existing conditions when Baycol was prescribed).

Against this background, Dr. Skeens diagnosed plaintiff with no Baycol-related side effects. *See* Skeens Dep. (Ex. A) at 78:12-79:2 (testifying "no side effect

problems were identified"); *id.* at 88:21-89:1 (concluding "Baycol did not cause Mr. McCollins any harm in terms of muscle aches"); *cf.* Exhibit B to Defendants' Motion to Strike Dr. Clarke (putative expert testimony that he could not determine whether McCollins "suffered physical injuries related to this patient's ingestion of Baycol"). Rather, as noted, the medication was "safe and effective in Mr. McCollins." Skeens Dep. (Ex. A) at 86:8-13.[4] This history illustrates some of the individual factual inquiries required to determine whether Baycol benefited or purportedly injured each putative class member.

C. Mr. McCollins Is Not An Adequate Class Representative.

Defendants do not intend to review all of the arguments in opposition to certification of the putative class, because this Court's prior holding and the evidence that individual issues predominate are each independent and adequate grounds for denying class certification. (Defendants incorporate their prior class certification arguments by reference.) But it should be noted briefly that Mr. Collins could not adequately represent the putative class.

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[4] Furthermore, Dr. Skeens prescribed Baycol with awareness of the potential risk of side effects, including muscle pain, associated with the drug. *See* Skeens Dep. (Ex. A) at 72:15-73:20; *id.* at 73:21-74:1 (testifying he apprised plaintiff about such warnings). Mr. McCollins admitted that he knew muscle pains were a potential side effects of Baycol use, *see* McCollins Dep. (Ex. C) at 103:21-104:2; *see also id.* 86:20-87:3, 90:11-17, 93:17-23, and unlike during his previous statin therapy, he neither reported such pains to his physician nor did he decide to stop taking Baycol because of pain.

Here, conflicts of interest exist between Mr. McCollins and the unnamed members of the putative class at nearly every turn. *See generally Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (adequacy requirement "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent"); *see also In re General Am. Life Ins. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004).

For instance, Mr. McCollins limits his economic claims to recovery of the amounts of his co-payments for Baycol, but the complaint focuses on alleged personal injuries to class members and ostensibly seeks damages for various economic losses as outgrowth of those purported injuries, including more extensive compensatory and punitive damages. *See, e.g.*, Compl. ¶ 36(h); *id.* ¶ 51 (alleging "grav[e] har[m]"); *id.* at 17 (seeking general, compensatory, consequential, punitive and exemplary damages, as well as the "[f]ull refund of all purchase costs" requested by Mr. McCollins); *compare* McCollins Dep. (Ex. C) at 46:20-47:4 (disclaiming any out-of-pocket expense incurred of the type where an individual "ha[s] to go to the doctor to ask the doctor, 'What is going on, has this [Baycol] caused me any injury?'"). Mr. McCollins cannot adequately represent purported absent class members who allegedly sustained consequential economic injuries that he did not incur.

Similar tensions are present given that Mr. McCollins lacks incentive, much less standing, to pursue claims of deceptive practices and misrepresentations, *see, e.g.*, Compl. ¶¶ 55-58, 61, as neither he nor his physician relied on any representations by defendants in deciding to purchase

or prescribe Baycol. *See, e.g.*, McCollins Dep. (Ex. C) at 100:5-101:21, 159:20-160:6, 104:19-105:2; *accord* Skeens Dep. (Ex. A) at 75:1-18, 34:18-36:14. Because Mr. McCollins' interests in pursuing his claims for limited relief conflict with the interests of the unnamed class members, he is an inadequate representative.[5]

For all these reasons, as well as those considered in this Court's original denial of class certification, class certification should be denied.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S INDIVIDUAL CLAIMS.

After plaintiff's class allegations are stricken, defendants should be granted summary judgment on Mr. McCollins' individual claims. *See* Fed. R. Civ. P. 56. This motion focuses upon one issue: Mr. McCollins has no cognizable evidence he sustained an economic injury caused by defendants. As set forth in Part II.A,

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[5] Moreover, by limiting this lawsuit to economic loss claims, Mr. McCollins could extinguish injury claims of absent class members. *See Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 604 (D. Minn. 2005) (class representatives inadequate where they pursued a different type of damages relief than the absent class members); *In re Universal Service Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 668-69 (D. Kan. 2004) (inadequacy occurs when representative opts "to pursue certain claims on a class-wide basis while jeopardizing the class members' ability to subsequently pursue other claims"); *In re Methyl Tertiary Butyl Tether Prods. Liab. Litig.*, 209 F.R.D. 323, 338-340 (S.D.N.Y. 2002) (finding representative's disavowal of personal injury claims showed that his interest was not sufficiently substantial to adequately represent class members who did sustain personal injury).

West Virginia law requires proof that defendants caused plaintiff to suffer an actual financial injury caused by an alleged defect in the product or by defendants' alleged misrepresentations. *See supra*, at 9. The record contains no evidence that would allow Mr. McCollins to make such a showing.

First, where a purported defect is at issue, to recover for economic injury a plaintiff must show more than that the product "suffer[s] from defects"; rather, the purported "defect must manifest itself" in *plaintiff's* product. *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (holding "[w]here, as in this case, a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies"); *Baycol*, 218 F.R.D. at 213-14 (rejecting plaintiffs' arguments that economic harm did not require showing of Baycol-related injury or lack of health benefit); *cf. Aikens v. Debow*, 541 S.E.2d 576, 583-87, 589-91 (W. Va. 2000) (warning about the dangers of allowing pure "economic loss" claims to proceed in tort without a showing of damage to person or property).

The record contains no medical evidence that Mr. McCollins was injured by Baycol. To the contrary, his physician testified that Baycol worked well for Mr. McCollins and caused no injury. *See supra*, at 10-11; *accord* Skeens Dep. (Ex. A) at 77:18 (concluding "*[Baycol] was perfect for [Mr. McCollins]*") (emphasis added). Because Mr. McCollins did not sustain any personal injury as a result of his Baycol use, but instead received health benefits, he cannot show economic damage caused by Baycol. *See City Nat'l Bank of Charleston*, 384 S.E.2d at 382; *Bertovich*, No. 5:05CV74, 2006 WL 2382273, at *4-5 (N.D.W. Va.); W. Va. Code § 46A-6-106. Quite simply, "plaintiff has

received the benefit of his bargain and has *no basis to recover purchase costs.*" *Williams v. Purdue Pharma. Co.*, 297 F. Supp. 2d 171, 176 (D.D.C. 2003). *See Prudential Ins. Co. of Am. v. Couch*, 376 S.E.2d 104, 108 (W. Va. 1988) (basis for unjust enrichment claim is that defendant has retained money on which it has no valid claim).[6]

Second, plaintiff cannot proceed to trial on the theory that he suffered economic damage because defendants' purportedly misleading representations caused him to buy a product that he would not have purchased. *See, e.g., id.*; *United States v. Massenburg*, No. Civ.A.2:03-0437, 2004 WL 2370694, at *6 (S.D.W. Va. Oct. 21, 2004) (claim failed where plaintiff could not prove that monies received by defendant were the result of a fraudulent scheme). *See also Pinnacle Comm. Int'l, Inc. v. Am. Family Mortgage Corp.*, 417 F. Supp. 2d 1073, 1088 (D. Minn. 2006) (granting summary judgment where plaintiff admittedly did not rely on alleged misrepresentation); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (plaintiff's claims fail where plaintiff cannot show he

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[6] Indeed, the Fifth Circuit has concluded that a plaintiff asserting such a claim does not even have standing:

> [Plaintiff's] claim to injury runs something like this: [Defendants] sold [Baycol]; [Plaintiff] purchased and used [Baycol]; [Defendants] did not list enough warnings on [Baycol], and/or [Baycol] was defective; other patients were injured by [Baycol]; [Plaintiff] would like [his] money back.

Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 319 (5th Cir. 2002). The Fifth Circuit held, such an assertion of a "loss of cash . . . cannot constitute an injury in fact." *Id.* at 319-20.

or she "saw, read, or in any way relied on the advertisements"); *Williams*, 297 F. Supp. 2d at 177.

Mr. McCollins acknowledges that he did not rely on any representations by defendants in deciding to purchase Baycol. *E.g.*, McCollins Dep. (Ex. C) at 100:5-101:21 (switched to Baycol because Zocor was removed from insurance formulary); 159:20-160:6.[7] Rather, he relied upon Dr. Skeens' medical judgment in taking Baycol. McCollins Dep. (Ex. C) at 104:19-105:2; *accord* Skeens Dep. (Ex. A) at 75:1-3. And Dr. Skeens testified that, in his medical judgment, Baycol had performed so well for plaintiff that there was no medical reason Mr. McCollins could not have continued taking Baycol when it was withdrawn from the market. Skeens Dep. (Ex. A) at 82:4-8. Thus, because any purported misrepresentations are unrelated to plaintiff's purported economic damages, he cannot present a triable issue of material fact.

Third, Mr. McCollins cannot show a triable issue on economic loss because Baycol was not only safe and

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[7] Plaintiff's express warranty claim is independently barred because Mr. McCollins does not point to a single affirmation of fact or promise made by defendants which formed the "basis of the bargain." W. Va. Code § 46A-6-101; *see Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F. Supp. 1194, 1200-01 (S.D. W. Va. 1986) (holding no statements made by defendant formed the basis of the bargain). At most, Mr. McCollins asserts that Bayer generically warranted that "Baycol was safe and well tolerated by patients studied," Compl. ¶ 32, yet this Court has already recognized that it is indisputable that Baycol "does lower cholesterol, does reduce inflammation, and . . . was a useful drug for reducing cardiovascular risk." *In re Baycol*, 218 F.R.D. at 213; *compare id. with* Compl. ¶ 48 (implied warranty claim asserting that Baycol was unreasonably dangerous and unfit for ordinary use).

effective for him, it gave him an economic benefit versus competing products. *See, e.g.*, McCollins Medical Records (Ex. B) GFM000043gfm (Baycol co-pay of $8.67); *id.* (Lipitor co-pays ranging from $8.41 to $18.98); CVSP000010gfm (Zocor co-pay of $20.06). Indeed, when Dr. Skeens switched Mr. McCollins from Baycol to Lipitor, Mr. McCollins' co-payments increased. *See* McCollins Medical Records (Ex. B) GFM000043gfm; McCollins Dep. (Ex. C) at 151:10-152:19 (discussing $18.01 co-payment). Accordingly, any claim that the value of the drug was less than its purchase price is specious given that plaintiff had experienced muscle aches and pains while taking other statins, had no health issue related to Baycol, and the competing statins would have been more expensive than Baycol. *Cf. Rezulin*, 210 F.R.D. at 68 (discussing restitution in form of purchase price).

In sum, because Mr. McCollins cannot show he sustained an economic injury caused by his use of Baycol, summary judgment should be entered for defendants.

CONCLUSION

For these reasons, Bayer and GSK respectfully request that the Court (1) deny remand; (2) deny class certification; and (3) enter summary judgment in favor of defendants and against Mr. McCollins on his individual causes of action.

Dated: January 10, 2007
Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed June 11, 2007]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
McCollins v. Bayer Corp., et al.	)
	)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO REMAND AND OPPOSITION TO BAYER AND GSK'S CROSS-MOTION TO DENY CLASS CERTIFICATION AND ENTER JUDGMENT AGAINST PLAINTIFF

INTRODUCTION[1]

In response to Plaintiff George F. McCollins' motion to remand this case to the West Virginia transferor court, not only did Defendants oppose this motion, but they also cross-moved to strike Plaintiff's class allegations and to enter summary judgment. As

[1] Plaintiff's counsel had previously granted counsel for Defendants several extensions to respond to the motion to remand. In exchange, counsel for Defendants gave Plaintiff's counsel an open-ended extension to file this reply brief.

discussed in detail below, remand is appropriate here. Even if the Court declines to remand now, however, Defendants' cross-motions to strike and for summary judgment should be denied. Plaintiff is an adequate class representative and common issues related to Defendants' liability outweigh any individual issues related to damages. Further, summary judgment is inappropriate as there are disputed questions pertaining to whether Baycol was different from or inferior to the product for which Mr. McCollins bargained.

ARGUMENT

I. PLAINTIFF'S MOTION TO REMAND SHOULD BE GRANTED

This case should be remanded to the transferor court because nearly all of the prerequisites for remand under PTO 149 §VI are satisfied. Plaintiff's fact sheet has been completed, Plaintiff has executed all of the authorizations provided by Defendants, and case-specific fact and expert discovery have been completed.

Under the governing statute, "it is not contemplated that a Section 1407 transferee judge will necessarily complete all pretrial proceedings in all actions transferred and assigned to him." *In re Evergreen Valley Project Litigation*, 435 F. Supp. 923, 924 (J.P.M.L. 1977). Defendants argue that remand is inappropriate because a few pretrial proceedings before this Court have not been completed. *See* Bayer and GSK's Resp. to Mot. for Remand and Cross-Mot. to Deny Class Cert. and Enter Judgment Against Pltf. ("Def.'s Mot.") at 6. The fact that the Court has not yet

ruled on the *Daubert* motions and the motion to strike the testimony of Plaintiff's case-specific expert, however, should not delay remand. The motion to strike Plaintiff's case-specific expert is unique to this particular action and its resolution will not touch on any issues that are common to the remaining MDL actions pending before this Court. As such, this issue should be decided by the *transferor* court.

Moreover, remand is appropriate in this case because the issues raised in the remaining motions are not highly specialized. Since their resolution does not require "any particular expertise . . . gained from supervising this litigation," they "can just as easily be presented to the transferor court." *In re Multidistrict Civil Actions Involving Air Crash Disaster Near Dayton*, 386 F. Supp. 908, 909 (J.P.M.L. 1975). In addition to the fact that the remaining issues are ones that can be easily litigated in the transferor court, remand in this case is not in any way inefficient. The transferor court is familiar with the claims made and the damages sought in this action. In fact, the transferor court is experienced in adjudicating class actions that are similar in nature to this case. The legal and factual issues in this case are not going to be new to the transferor court. In the past five years alone, the transferor court had five hundred twenty six product liability and/or personal injury cases on its docket.[2] Therefore, there is no risk that the transferor court would need a significant amount of time to learn

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[2] According to a search conducted on PACER on April 25, 2007, the United States District Court for the Southern District of West Virginia had 526 product liability and/or personal injury cases on its docket.

the facts and theories of this case. *See In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, MDL No. 897, MISC. 21-61, 92 Civ. 4555, 1995 WL 234975, at *4 (S.D.N.Y. Apr. 21, 1995) (denying a motion to remand in a case the presented a complex set of factual and legal questions because remand would force another court to make its way up a learning curve).

Here, there is no danger that the transferor court would duplicate efforts in order to learn the issues and theories in this case. Therefore, Defendants' argument that the transferor court may need to "invest significant time learning" the issues in this litigation has no basis. Def.s' Mot. at 7. As such, Plaintiff's motion should be granted.

II. CLASS CERTIFICATION IS APPROPRIATE

Assuming *arguendo* that the Court declines to remand this case, Defendants' cross-motion to deny class certification should be summarily denied. Defendants' cross-motion relies almost exclusively on the Court's prior ruling denying certification of a nationwide personal injury, medical monitoring, punitive damages and refund class; however, this case is inapposite to the previously denied national class action and, instead, is appropriate for class treatment. Importantly, the instant case is easily amenable to certification because any individualized issues of fact and law that led the Court to previously deny certification are no longer present in this limited action.

Additionally, the Defendants' motion relies on disputed contentions about the merits of Plaintiff's claims, rather than the procedural requirements of certification. These arguments are misplaced. Because of the flexibility of Rule 23, examination of the merits of a case on a motion for certification is inappropriate. *See, e.g., Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974) ("[N]othing in either the language or history of *Rule 23* . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); *Egge v. Healthspan Services Co.*, 208 F.R.D. 265, 267 (D.Minn. 2002) (same). Rather, when examining the appropriate elements for consideration under Rule 23, certification here is appropriate.

In particular, the West Virginia Supreme Court has examined the propriety of class action claims against drug companies in *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). In *In re Rezulin*, the plaintiffs brought claims for refunds under the West Virginia Consumer Credit and Protection Act ("WVCCPA") (the same claims sought here) as well as for medical monitoring relief. The Court found that the plaintiffs' refund claims were appropriate for class certification, laying out a test for ascertainable loss that is easily met in this case. *Id.* at 75. Under this persuasive precedent from the highest court in West Virginia, class certification should be granted.[3]

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[3] Plaintiff contends, however, that class certification is more appropriately resolved in the transferor court. Should this Court deny Plaintiff's motion to remand and reach the issue of class certification, Plaintiff is amenable to filing a motion for class certification outlining the arguments made in opposition to

The Supreme Court has repeatedly recognized that one of the fundamental purposes of Rule 23 is to enable aggrieved persons whose individual claims are dwarfed by the costs of litigation to seek judicial redress through the aggregation of claims into a single class action:

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980). In a later decision, the Supreme Court also recognized the efficiency benefit of class actions:

> [t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d

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Defendants' motion and presenting more evidence in support of class certification.

338, 344 (7th Cir. 1997)). *See also Eisen*, 417 U.S. at 161 (1974) ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.").

Thus, many courts have recognized that the arguments in favor of certification are "compelling" where, as here, each class member's individual stake is too low to justify the costs of litigation -- a circumstance commonly referred to as a "negative value" suit. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.1995) (a "negative value suit" occurs when the "stakes to each class member were too slight to repay the cost of the suit"); *Hobson v. Lincoln Ins. Agency, Inc.*, No. 99-C-5619, 2001 WL 648958, at *2 (N.D. Ill. June 7, 2001) (a *de minimis* claim is "precisely the type suitable for adjudication as a class action because no individual plaintiff would take on the alleged wrongs with only a single greenback to gain").

The costs of litigating an individual Baycol refund claim against these Defendants to recover economic damages from purchasing these drugs would dwarf the amount of any individual claim by many orders of magnitude. Striking Plaintiff's claims here would thus

contravene "[t]he policy at the very core of the class action mechanism." *Amchem,* 521 U.S. at 617.

A. Plaintiff's Class Claims Are Viable.

Although Defendants style their cross-motion as seeking to "deny" class certification under Fed.R.Civ.P. 23, the ultimate relief they seek in their memorandum is that clear: "Plaintiff's Class Allegations Should be *Stricken* as a Matter of Law." Def. Mot. at 7 (emphasis added). Defendants' cross-motion to "strike" Plaintiff's class allegations should be denied.

Fed.R.Civ.P. 12(f) provides that "[u]pon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." While the court is afforded broad discretion in ruling on a motion to strike, *see Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op.*, 278 F.3d 742, 748 (8th Cir. 2001), such motions are "viewed with disfavor and are infrequently granted." *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000).

Likewise, as commentators have made clear:

> Both because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory or harassing tactic, numerous judicial decisions make it clear that motions under Rule 12(f) are viewed with disfavor by the federal courts and are infrequently granted.

5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 (3d ed. 2004). In order to succeed on a Rule 12(f) motion, "it must be shown that the allegations being challenged are so unrelated to the plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party." *Id. See also Strate v. Midwest Bankcentre, Inc.*, 2003 U.S. Dist. LEXIS 26277 at * 18 (E.D.Mo. 2003) (A Rule 12(f) movant "bears the burden of demonstrating that the challenged allegations are so unrelated to plaintiff's claim as to be devoid of merit, unworthy of consideration, and unduly prejudicial."). "[E]ven when technically appropriate and well-founded, Rule 12(f) motions are not granted in the absence of a showing of prejudice to the moving party." Wright & Miller, at § 1381.

Thus, on Defendants' cross-motion to strike, the burden is on Defendants to show that class certification is improper and all reasonable inferences are construed in favor of Plaintiff:

> The present question before the Court . . . is not whether the class should be certified, but whether the class allegations in the complaint should be stricken. At this stage, the burden is not on the party seeking class certification[;] rather, as the non-moving party, all reasonable inferences must be construed in [Plaintiffs'] favor.

Bessette v. Avco Financial Services, Inc., 279 B.R. 442, 451 (D.R.I. 2002) (citing *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990)).

See also 2 Herbert Newburg & Alba Conte, Newberg on Class Actions § 7.22 at 7-75 (3d ed. 1992) ("[W]here defendants contend that certification is precluded as a matter of law before the filing of the certification motion, defendants bear the burden of demonstrating that on the face of the complaint, class certification is impossible."); *Bryant v. Food Lion, Inc.*, 774 Supp. 1484, 1495 (D.S.C.1991) (when defendants contend that class certification is precluded as matter of law, defendants bear burden of demonstrating it will be impossible for plaintiffs to prove facts supporting class certification).

In particular, Defendants base their motion to strike on the grounds that this Court definitively ruled "that economic loss claims cannot be litigated on a classwide basis." Def. Mot. at 7 (citing *In re Baycol Prods. Litig.*, 218 F.R.D. at 213-14). This was not the holding of the Court, nor should the Court's previous decision operate to bar the limited class claims in this case.

Significantly, the Court's primary opposition to certification of the nationwide refund class was concerns about variation in the numerous states' laws that had to be applied. *Id.* at 214. The Court held:

> This Court finds that Plaintiffs have not provided the Court sufficient information for it to conclude that the laws concerning unjust enrichment and breach of warranty are not significantly or materially different. Plaintiffs have thus failed to demonstrate that common issues of law predominate.

Id. Plaintiff's claims here are limited to West Virginia residents and West Virginia law. As such, the Court's previous concerns about variance in law have no applicability here. Similarly, the Court's prior decision cannot operate to bar Plaintiff's more narrow, state-only class.

The Seventh Circuit Court of Appeals was presented a similar situation in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation,* 333 F.3d 763 (7th Cir. 2003). In *Firestone,* owners of sport utility vehicles that were equipped with Firestone tires brought a *nationwide* class action over abnormally high tire failure rates. The district court certified the nationwide class, which the Court of Appeals, 288 F.3d 1012, reversed. Nevertheless, plaintiffs in other states sought state-only class actions, some of which were certified, and the defendants sought to enjoin such actions based on the Court of Appeals' previous denial of a nationwide class. The Court of Appeals *rejected* defendants' arguments that the previous denial of class certification was preclusive:

> State courts are free to decide for themselves how much effort to invest in creating subclasses (so that each model of tire or SUV receives appropriate consideration); advice designed to ward off what a federal court deems an unproductive investment of judicial time does not create a 'judgment' that *forbids* any state tribunal to make the effort. Indeed, our opinion contemplated that states would certify narrower classes; we gave, as an example, '1995 Explorers in

> Arizona equipped with a particular tire specification'.

333 F.3d at 766. As such, the Court's previous rejection of a nationwide class does not bar subsequent consideration of this state-only class.

Plaintiff's narrow economic loss claims under West Virginia warranty and unjust enrichment theories are amenable to class certification.[4] Nevertheless, to the extent the Court finds that its previous holding with respect to nationwide class certification of these two particular claims is persuasive here, the Plaintiff has brought a claim under the WVCCPA and would seek certification solely of this claim.[5] As noted, the West Virginia Supreme Court has specifically opined on the damage requirement under this statute and found that

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[4] *See, e.g., Tesauro v. Quigley Corp.*, No. 1011, Control 051340, 2002 WL 372947, at *5-6, 9 (Pa. Ct. Com. Pleas Jan. 25, 2002) (certifying a class of consumers who purchased "Cold-Eeze" under implied warranty and unjust enrichment theories); *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1180 (Ala. 2000) (certifying breach of implied warranty skin cream action); *Gordon v. Boden*, 586 N.E.2d 461, 465 (Ill. Ct. App. 1 Dist.,1991) (certifying breach of implied warranty claim involving adulterated orange juice); *Gasperoni v. Metabolife*, No. 00-71255, 2000 WL 33365948, at *6 (E.D. Mich. Sept. 27, 2000) (certifying breach of warranty class action involving drug products); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 956-57 (E.D. Tex., 2000) (certifying breach of warranty claim involving computers); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998) (certifying telephone charge unjust enrichment class); *Hinshaw v. AT&T Corp.*, No. 29D01 9705 CP 000308, 1998 WL 1799019, at *10-11 (Ind. Super. Aug. 24, 1998) (same).

[5] All of the Plaintiff's claims seek economic loss as a result of purchasing Baycol.

a factually analogous case was appropriate for class certification. Since this Court has not considered class certification of a limited refund class under this particular West Virginia law, Defendants' cross-motion to strike should be denied on these grounds alone.

A. Class Certification is Appropriate Here Because the Case Meets Rule 23's Statutory Requirements

The Plaintiff's proposed class must satisfy the requirements of Rule 23(a) and at least one provision of Rule 23(b). *Bradford v. AGCO Corp.*, 18 F.R.D. 600, 602 (W.D.Mo. 1999). Rule 23(a) has four component requirements: (1) the members of the class are so numerous that joinder is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a); *See, e.g., Paxton v. Union Nat'l Bank of Little Rock*, 688 F.2d 552, 559 (8th Cir. 1982). The proposed class also satisfies requirements of Rule 23(b)(3): (1) questions of fact and law common to the class predominate over questions affecting only individual members, and (2) a class action is superior to other available methods for fair and efficient adjudication of the controversy. Fed.R.Civ.P. 23(b)(3).

In considering class certification, Rule 23 should be liberally construed. *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831, *cert. denied*, 434 U.S. 856 (1977). For purposes of examining a motion on certification, the Court is to accept the substantive allegations of the Plaintiff to be true. *E.g., Lockwood Motors, Inc. v.*

General Motors Corp., 162 F.RD. 569, 573 (D.Minn 1995) (court should not examine merits of plaintiffs' claims when deciding issues of class certification, and predetermination of merits at this stage is inappropriate).

Defendants move to strike the Plaintiff's class allegations on two limited grounds: 1) because individual issues of fact allegedly predominate; and 2) because Mr. McCollins is allegedly an inadequate class representative. Def. Mot. at 9-14. As such, Defendants do not contest the numerosity, commonality and typicality requirements of Rule 23(a). Nor do Defendants dispute that issues of *law* predominate and that a class action is a superior method for addressing Plaintiff's claims. Plaintiff will briefly address these undisputed Rule 23 elements.

1. The Members of the West Virginia Class are So Numerous that Joinder of All Members is Impracticable.

Although "[n]o arbitrary rules regarding the necessary size of classes have been established," *Paxton*, 688 F.2d at 559, the class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). If the court can draw reasonable inferences as to the appropriate size of the class and the infeasibility of joinder, numerosity is satisfied. *See In re Kirschner Medical Corp. Secs. Litig.*, 139 F.R.D.74, 78 (D.Md. 1991) (noting that "as few as 25 to 30 members raises the presumption that joinder would be impracticable"); *Swanson v. American Consumer Indus., Inc.*, 415 F.2d 1326, 1333 n.9 (7th Cir. 1969) (certifying class of as few as 40 members). The West Virginia Class includes thousands of

potential litigants within the state. Second Amended Class Action Complaint ("Compl."), at ¶ 35. This Court has previously ruled that a class of thousands meets the numerosity requirement. *In re Baycol*, 218 F.R.D. at 204. Joinder of all these plaintiffs is impracticable. Thus, this West Virginia Class satisfies the numerosity requirement of Rule 23(a)(1).

2. There are Questions of Law and Fact Common to the West Virginia Plaintiff and West Virginia Class

Rule 23(a)(2) requires that the claims of the class members involve common questions of law or fact. "It is not necessary that all questions of law and fact are common to the class, rather the commonality requirement is met were, [sic] for example, 'the question of law linking the class members is substantially related to the resolution of the litigation, even though the individuals are not identically situated.'" *In re Baycol*, 218 F.R.D. at 205 (quoting Paxton, 688 F.2d at 561.). Rule 23(a)(2) requires only one, not all, questions of fact and law must be common to class members. *See Deboer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). This Court previously accepted common issues of law and fact to include:

- whether Baycol causes injury;
- whether Defendants concealed adverse events from the FDA; and,
- whether Defendants failed to adequately warn of the risks of Baycol.

In re Baycol, 218 FR.D. at 205. The issues of law and fact are also common to this limited West Virginia class.

3. The Claims of the Representative Plaintiff are Typical of the Claims of the Class

Rule 23(a)(3) requires that the claims of the class representatives be typical of the claims of the class. Typicality involves a showing that there are "other members of the class who have the same or similar grievances as the plaintiff." *Donaldson*, 554 F.2d at 830; *Paxton*, 688 F.2d at 562. The rationale of the typicality requirement is to ensure the class representative "will pursue his or her own self-interest in the litigation, and in so doing, will advance the interests of the class members [.]" A. Conte & H. Newberg, 1 *Newberg on Class Actions* § 3:13 at 325 (4th ed. 2002).

"The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff:" *DeBoer*, 64 F.3d at 1174. "[A] strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Lockwood*, 162 F.R.D. at 575.

As the West Virginia Supreme Court found in *In re Rezulin*, "'differences in the situation of each plaintiff or each class member do not necessarily defeat typicality: The harm suffered by the named plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type.'" *In re Rezulin*, 585 S.E.2d at 68 (*quoting Boggs v. Divested Atomic Corp.*, 141 F.R.D.

58, 65 (S.D.Ohio 1991) (citations omitted)). Furthermore, "'[t]he fact that a defense may be asserted against the named representatives, as well as some other class members, but not the class as a whole, does not destroy the representatives' status.'" *In re Rezulin*, 585 S.E.2d at 68 (*quoting Shutts*, 679 P.2d at 1172).

Here, the class representative's claims are typical of the class members.

4. The Class Representatives Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). In analyzing Rule 23(a)(4), courts should consider "(1) [whether] the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Paxton*, 688 F.2d at 562-63. This is the only element of Rule 23(a) that Defendants have raised in their cross-motion.

Plaintiff has retained experienced counsel who are qualified to prosecute this action. Similarly, adequacy of counsel was not challenged in the national class litigation. *In re Baycol*, 218 F.R.D. at 206. Instead, Defendants here argue that named Plaintiff McCollins is not an adequate class representative because his economic loss claims may not be as extensive as other class members. Def. Mot. at 12-14.

Defendants first assert that Plaintiff's Second Amended Class Action Complaint seeks "damages for various economic losses as outgrowth of purported [personal] injuries, including more extensive compensatory and economic damages." Def. Mot. at 13. Defendants' attempts to raise a "straw man" argument about damages Plaintiff and the class are not seeking in order to prevent class certification should be rejected. Plaintiff and the class seek limited out of pocket expenses related solely to their purchase of Baycol and the Second Amended Class Action Complaint cannot be read otherwise. While Defendants attempt to take snippets of Mr. McCollins' deposition transcript out of context, he is clear about what he is seeking through this suit:

> Q: Do you seek to recover the portion of the purchase price of Baycol that came out of your pocket?
> A: Yes.
> Q: Do you seek to recover anything in this case as far as economic damages?
> A: That's the only economic damage I had.

28: 4-11. This was further clarified during a discussion about the Plaintiff's fact sheet:

> Mr Yianne [Plaintiff's Counsel]: If it has to do with his cost for Baycol, then, yes, we would supplement and indicate that the plaintiff is seeking his out-of-pocket cost for the unused Baycol. But if it is talking about out-of-pocket expenses in terms of having to go to the doctor to ask the doctor, "What is going on, has this caused me any injury?:,

> then Mr MCCollins is not making a claim for those type of out-of-pocket expenses.
> By Mr Legg: Q: Sir, do you agree with your attorney's characterization of your claim?
> A: Yes

46:20-23; 47: 1-8; *see also* 144:1-9 ("What are you – of any type – what loss are you claiming that you personally experienced as a result of taking Baycol .... Well, just the loss of my co-pay and whatever the law allows me to get."). Plaintiff's Second Amended Class Action Complaint is not seeking damages for any members of the Class beyond those sought for Mr. McCollins.[6] *See* Comp. at ¶ 67 ("As a result of the acts of these unfair and deceptive trade practices and, or consumer fraud described above, Plaintiff and the Class have suffered ascertainable loss – *economic loss that includes the purchase price of the product* – for which Defendants are liable to Plaintiff and the Class for their ascertainable losses.") (emphasis added).

Defendants also claim that because Mr. McCollins does not have damages that are as substantial as other class members, he has a conflict of interest in representing the class. This is a logical fallacy. Mr. McCollins has the same interest in establishing Defendants' liability and seeks the same types of remedies through the same theories of law. This shared interest makes Mr. McCollins an adequate

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[6] To the extent there is any ambiguity in the Second Amended Class Action Complaint, Plaintiff will seek only to certify refund and out of pocket expenses related solely to the purchase of Baycol when Plaintiff moves for class certification. Regardless, any disputes about recoverable economic loss should not be resolved on Defendants' cross-motion to strike.

class representative despite differences in the amount of damages sought. West Virginia courts, in reviewing claims under the WVCCPA, have found that differences in damages are not impediments to class certification. *In re Rezulin*, 585 S.E.2d at 69.

It is well settled that the presence of individual damages issues will not defeat predominance. *See Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003), *reh'g en banc denied*, 362 F.3d 739 (11th Cir. 2004) ("[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate."); *In re Ampicillin Antitrust Litig.*, 55 F.R.D. 269, 276 (D.D.C. 1972); *Christiana Mortgage Corp. v. Del. Mortgage Bankers*, 136 F.R.D. 372, 382 (D. Del. 1991) ("Should it be necessary to calculate the amount of damages for each class member on an individual basis, this would not preclude class certification"); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977). As the Eleventh Circuit noted in the *Klay v. Humana* HMO RICO litigation:

> In assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods for computing damages are so insubstantial as to amount to no method at all . . . . Plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis. Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be

> calculated on an individual basis is no impediment to class certification.

382 F.3d at 1259-60 (internal brackets, quotations and footnotes omitted). Further, the court noted that even if the individual plaintiffs' damage claims required "corroboration and individualized consideration, such inquiries are outweighed by the predominating fact that the Defendants allegedly conspired to commit, and proceeded to engage in, a pattern of racketeering activities to further their Managed Care Enterprise." *Id.* at 1260.[7] Because Mr. McCollins shares a common interest with all class members in establishing Defendants' liability, he will fairly and adequately protect the interests of the Class in accordance with Rule 23(a)(4).

Defendants' argument that Mr. McCollins may extinguish personal injury claims of absent class members is unfounded. *See* Def. Mot. at 14, n.5. Claim preclusion bars absent class members' subsequent claims for personal injury only if such claims "*were or could have been* raised" in the present action. *Rivet v. Regions Bank*, 522 U.S. 470, 476 (emphasis added).

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[7] *See also In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y.1996) ("We need not consider [defendant's expert affidavit] in detail, as it is for the jury to evaluate this conflicting evidence and to determine what weight to give the expert's conclusions.") (citations omitted); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 522 (S.D.N.Y. 1996) ("The Court need not decide at [the class certification] juncture what [economic methodologies are] best suited to the particularities of this case. It is sufficient to note at this stage that there are methodologies and that Rules 23(c)(1) and (d) allow ample flexibility to deal with these issues.").

This Court has already ruled that personal injury claims are inappropriate for class certification and, as such, claim preclusion would not apply. *See, e.g., Barnes v. American Tobacco Co., Inc.*, 176 F.R.D. 479 (E.D. Pa. 1997) (holding that the failure to bring claims not suitable for class-wide adjudication is not improper claim-splitting).[8]

Further, "[s]ince claim preclusion is grounded upon considerations of fairness and efficient judicial administration, the doctrine is not applied rigidly where such interests would not be served." *Gloucester Marine Railways Corp. v. Charles Parisi, Inc.*, 36 Mass. App. Ct. 386, 391 (1994); *see also United States v. Am. Heart Res. Found.*, 996 F. 2d 7, 11 (1st Cir. 1993) (holding that *res judicata* is a judge-made doctrine not to be applied where practical concerns favor separate actions). Considerations of fairness and efficient judicial administration overwhelmingly favor certification for the purpose of adjudicating the claims

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[8] As for those individuals who have not yet manifested a personal injury but who may in the future, like in the asbestos cases, the bringing of a claim for a later emerging disease is not barred by claim preclusion. *See, e.g., Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 117 n.33 (D.C. Cir. 1982) (allowing a plaintiff to file a second suit for asbestos-related cancer after filing an asbestosis suit because the cancer is a distinct injury); *Gasperoni*, 2000 WL 33365948, at *4 (granting class certification to plaintiffs alleging fraudulent misrepresentation and breach of warranty: "[T]he only legal issue to be certified is simply whether the label is materially misleading. Any personal injuries that develop in class members after the present suit, will not be subject to res judicata because their claim will not have been *actually litigated*, nor will it be one that might have been raised in the previous suit.") (emphasis added).

for class-wide relief asserted in this action. As one court has observed:

> What defendants have characterized as "splitting" causes of action is perfectly appropriate under Rule 23. It is not uncommon for defendants to engage in a course of conduct which gives rise to a variety of claims, some amenable to class treatment, others not. Those claims that are amenable should be prosecuted as class actions in order to realize the savings or resources of courts and parties that Rule 23 is designed to facilitate. . . . Class representatives must press all claims which can be prosecuted on a class basis, but they need not and should not press for certification of claims that are unsuitable for class treatment.

Sullivan v. Chase Inv. Servs. of Boston, Inc., 79 F.R.D. 246, 265 (N.D. Cal. 1978) (citation omitted). Indeed, such claim splitting arguments have been rejected repeatedly by other courts where consumer fraud claims were brought for products that might have also caused personal injuries.[9]

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[9] *See, e.g., Howard v. Brown & Williamson Tobacco Corp.*, No. 00-L-136, 2001 WL 1910779, at *1 (Ill. Cir. Ct. Dec. 18, 2001) ("This Court believes there is no impermissible splitting of claims here since this consumer fraud action seeking the return of the purchase price of light cigarettes presents legal claims separate and distinct from any personal injury claims relating to smoking that the class members may have now or in the future against the Defendant. Any and all such claims for personal injury by class members are not and could not be included in this case and are

Moreover, only a small number of class members might have a present claim for personal injury as most of the personal injury cases in the MDL have been resolved. These individuals, if they prefer, have the option to exclude themselves from the class by opting out under Rule 23(c)(2). *See, e.g., Uniondale Beer Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 340, 343 (E.D.N.Y. 1987) (holding that "any class member holding a different position on the benefits of the lawsuit or believing that its interests conflict with those of the named representatives may 'opt-out' pursuant to the provisions of Rule 23(c)(2)"); *Marrone*, 2004 WL 2050485, at *5 ("Any members of the class who wish to individually pursue personal injury actions may preserve those rights by opting out of the class."); *Gunnels v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003) ("Rule 23(c)(2) permits members of a class maintained under section (b)(3) to opt out of the class, providing an option for those Plaintiffs who wish to pursue claims against [the defendant] requiring

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hereby specifically preserved."); *Miles v. Philip Morris Cos.*, No. 00-L-0112, 2001 WL 34366710, at *2 (Ill. Cir. Ct. Feb. 1, 2001) ("As to defendants' challenge of the adequacy of the named plaintiffs on the basis that the plaintiffs are impermissibly splitting the claims of the unnamed class members by seeking to recover only the purchase price of the light cigarettes, this Court believes that there is no impermissible splitting of claims in this action."); *Marrone v. Philip Morris USA, Inc.*, No. 03CA0120-M, 2004 WL 2050485, at *6 (Ohio Ct. App. Sept. 15, 2004) ("Any individual personal injury claims of absent class members would not be precluded because those claims cannot be litigated in this action."); *Aspinall v. Philip Morris Cos.*, 813 N.E.2d, 476, 489 n.19 (Mass. 2004) (holding that claim preclusion did not apply because the class members would not have the opportunity to raise personal injury claims during a class action which was certified to proceed only on an economic theory of damages).

more individualized inquiry."); *Hudson v. Capital Mgmt. Int'l, Inc.*, 565 F. Supp. 615, 631 (N.D. Cal. 1983) ("Whatever the resolution of those claims, if any potential conflict exists, it may be eliminated by class members' use of the opt-out mechanism provided under Rule 23(c)(2)."). Likewise, this Court can simply expressly reserve class members' rights to bring claims for personal injuries in later litigation in entering final judgment.[10]

Thus, Defendants have failed to establish that Plaintiff's class allegations should be stricken.

5. The West Virginia Class Fulfills the Requirements of Rule 23(b)(3)

In addition to the requirements of Rule 23(a), the proposed class must satisfy one provision of Rule 23(b). Plaintiff seeks certification under Rule 23(b)(3), which requires that (1) common issues predominate over individual issues and (2) class treatment is superior to

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[10] *See, e.g.*, Wright, Miller & Cooper. Federal Practice & Procedure § 4413 at 105 (1981) ("A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion."); *see also Washington Public Power Supply System v. Pittsburgh-Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989). As stated in the Restatement (Second) of Judgments § 26(1)(b):

> When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against a defendant:
>
> . . .
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; . . .

other methods of adjudication. Fed.R.Civ.P. 23(b)(3). For common issues to predominate, Plaintiff need only show that generalized evidence exists such that the predominant issues in a case may be resolved on a class-wide basis. *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 596 (N.D.Fla. 1998) ("the court is only to consider whether the type of proof offered by plaintiffs to attempt to prove injury to the class members will be of a class-wide character such that class action treatment of the case will be superior to myriad individual actions"). "The guiding principle for (b)(3) certification is that the interests of the parties can best be served by settling their differences in a single action." *Id.* at 595 (internal citation omitted). It is sufficient if the predominant issues can be resolved on a class-wide basis, even if some individual issues remain. *See In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D.Minn. 1995).

In determining whether common questions of fact predominate, the Court must determine whether "common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *In re Agent Orange Product Liability Litig.*, 100 F.R.D. at 718, 722 (E.D.N.Y. 1983). The most "pragmatic" way for the Court to make this determination is to assess whether common proof of Plaintiff's claims will predominate at trial. *See, e.g., In re NASDAQ*, 169 F.R.D. at 517 ("Plaintiffs' burden on this motion for class certification is to establish that common proof will predominate at trial. . . ."); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (the "significant part" requirement is met if "jury findings on the class questions [will] significantly advance the resolution of the underlying . . . cases").

Even if individual issues are present, class certification is warranted since all issues common to the Class arise under West Virginia law. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) ("[C]lass relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class") (internal quotation omitted); *Westfall v. Kendle Int'l*, No. 1:05-cv-001118, 2007 U.S. Dist. LEXIS 11304 at *34 (N.D. W.Va. Feb 15, 2007) (applying West Virginia law). Also, even if Class members may have to "individually demonstrate their right to recover, or that they may suffer varying degrees of injury, [class action is not] precluded by the presence of individual defenses against class plaintiffs." *In re Rezulin*, 585 S.E.2d at 67 (*quoting* 1 *Newberg on Class Actions*, § 3:12 at 314-15 (4th ed. 2002). The existence of "some factual differences in the claims of the potential class members, such as the varying amounts of damages and degrees of reliance on [Defendants'] misrepresentations . . . *are irrelevant . . . since there are common questions of law in this case.*" *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 640 (D.Colo. 1986) (emphasis added). *See also In re Rezulin*, 585 S.E.2d at 67.

Common issues of fact and law relative to the design, manufacture, and marketing of Baycol predominate over any individual issues relating to Class members. Therefore, certification under Rule 23(b)(3) is appropriate. Nevertheless, Defendants maintain that individual issues predominate here because Baycol may have "worked" for Mr. McCollins by lowering his cholesterol and because his cramps may be unrelated to his Baycol use. Def. Mot. at 11-12. These issues, even if true, do not support striking

Plaintiff's class allegations. Under the West Virginia Supreme Court's binding interpretation of the WVCCPA, ascertainable loss does not require a plaintiff to prove that a product did not "work" or that it caused a personal injury:

> We conclude that for a consumer to make out a *prima facie* case to recover damages for 'any ascertainable loss' under W.Va.Code 46A-6-106 [WVCCPA], the consumer is not required to allege a specific amount of actual damages. If the consumer proves that he or she has purchased an item that is different from or inferior to that for which he bargained, the 'ascertainable loss' requirement is satisfied.

In re Rezulin, 585 S.E.2d at 75. Likewise, the Court concluded that trial court had erred in holding that individual damages predominated over the alleged misconduct of defendants. *Id.*

Here, Plaintiff has alleged that Defendants "made untrue, deceptive or misleading representations of material facts to, and omitted and/or concealed material facts from, Plaintiffs and members of the Class . . . The misrepresentations and omissions described herein were likely to deceive consumers into purchasing and ingesting Baycol." Comp. at ¶¶ 57-58. Mr. McCollins testified that Baycol was "a bad product" that "hurt a lot of people." 16: 20-21; *see also id.* at 149: 17 (describing Baycol as a "bad drug."). Further, Mr. McCollins alleges that if the drug had been safe, Defendants would not have pulled it off of the market. 27:20-22. These allegations are sufficient to establish a claim under the WVCCPA and further

support the fact that common issues predominate over any issues related to loss as Plaintiff's claims can be objectively decided on a classwide basis.

Rule 23(b)(3) also requires that a class action must be superior to other methods "for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). In evaluating superiority, the "focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Klay*, 382 F.3d at 1269. Plaintiff is not aware of any other procedure that would allow the Court to deal with these small, economic loss claims as efficiently, consistently, and fairly as a class action. The only other alternative approach would be nearly identical individual lawsuits for losses that are generally under $1,000 and, in many cases, are less than $100; this is patently inferior to a class action to deal with Defendants' fraudulent and deceptive conduct. *See, e.g., Tedesco v. Mishkin*, 689 F. Supp. 1327, 1336-37 (S.D.N.Y. 1988). Additionally, the resolution of these claims in one forum will be highly efficient. *In re Agent Orange*, 100 F.R.D. at 720 (*quoting Williams, Mass Tort Class Actions*, 98 F.R.D. 323, 324 (1983) ("A number of courts have seen the class action as the only alternative 'to trying . . . virtually identical lawsuits, one-by-one,' resulting in the 'bankruptcy of both the state and federal court systems.'").[11] Plainly the class procedure

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[11] *See also Klay*, 382 F.2d at 1270 ("Holding separate trials for claims that could be tried together 'would be costly, inefficient, and would burden the court system' by forcing individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts.") (citation omitted); *In re*

is superior to any alternative procedure for dealing with these issues.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

Defendants assert that Mr. McCollins has no "cognizable evidence" that he suffered an economic injury caused by defendants. Def. Mot. at 14. In particular, Defendants contend that the record contains no evidence that Mr. McCollins sustained a personal injury from his Baycol use; he did not rely on any misrepresentations; and that Baycol was less expensive. *Id.* at 15. Even if true, however, none of these allegations would conclusively establish judgment for Defendants.

Defendants cite cases from around the country but ignore the one controlling case on point which interpreted West Virginia's Consumer Credit and Protection Act: *In re Rezulin*. As discussed above, to proceed under that Act, neither Plaintiff nor the Class needs to establish a personal injury, reliance, or that alternatives were less expensive. Under the WVCCPA,

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School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (class treatment is superior "over the situation which the same separate suits require adjudication on liability using the same evidence over and over again"); *In re Cordis Corp. Pacemaker Prod. Liab. Litig.*, No. MDL 850 C-3-86-543, 1992 WL 754061, at *15 (S.D. Ohio 1992) ("The repetitive proof of these historic facts would waste an inordinate amount of scarce judicial resources"); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991) ("It would neither be efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues").

the West Virginia Supreme Court has made clear that a plaintiff suffers a loss if "he or she has purchased an item that is different from or inferior to that for which he bargained . . . ." *In re Rezulin*, 585 S.E.2d at 57. Clearly, there are disputed facts about whether or not Baycol was "different from" or "inferior to" the product for which Mr. McCollins bargained. As such, summary judgment is inappropriate.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to remand to the transferor court should be granted and Defendants' cross-motions to strike class allegations and for summary judgment should be denied.

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[*Certificate of Service Omitted in Printing of this Appendix*]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed December 21, 2007]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Black, et al. v. Bayer Corp., et al.	)
	)

BAYER AND GSK'S REPLY IN SUPPORT OF THEIR CROSS-MOTION TO DENY CLASS CERTIFICATION AND ENTER JUDGMENT AGAINST PLAINTIFF

Plaintiff George McCollins suffered no injury from his use of Baycol and, in fact, benefited from the medicine. He does not dispute these facts and indeed, has cited no evidence whatsoever in opposition to defendants' motion for summary judgment as to his individual economic loss claims. *See* Plaintiff's Reply in Support of Motion to Remand and Opposition to Bayer and GSK's Cross-Motion to Deny Class Certification and Enter Judgment Against Plaintiff ("Opp.") at 24. Nevertheless, Mr. McCollins contends that this Court should certify an economic loss class with him as the class representative or allow him to try his luck

seeking class certification in front of another judge.[1] Mr. McCollins' only support is a West Virginia decision certifying a class involving another medicine – a decision that this Court explicitly rejected as inapposite when the Court denied certification of the Baycol master class action complaint four years ago.

The Court should reject Mr. McCollins' attempt to relitigate class certification. Individual issues of fact continue to predominate with respect to economic loss claims and Mr. McCollins is a manifestly inadequate representative of the putative class. Further, the Court should enter summary judgment against Mr. McCollins because a plaintiff's unsupported allegations are not enough to create a triable issue of material fact. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986) (a party cannot rest on allegations unsupported in fact to avoid summary judgment); *Thomas v. Corwin*, 483 F.3d 516, 530 (8th Cir. 2007) ("skeletal allegations, unsupported with specific facts or evidence, are insufficient to create a genuine issue of fact so as to preclude granting summary judgment").

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[1] Mr. McCollins seeks damages for economic losses on behalf of himself and a class of West Virginia residents for breach of warranty, unjust enrichment, and unlawful acts or practices under the West Virginia consumer protection laws. *See* Second Amended Complaint ("Compl.") ¶¶ 34, 41-67.

I. CLASS CERTIFICATION SHOULD BE DENIED.

A. Mr. McCollins Cannot Evade This Court's Prior Ruling.

This Court required that all plaintiffs seeking class certification file motions for class certification by May 15, 2002. *See* PTO 4 at § IV.E. After extended briefing, the Court denied certification for putative class actions alleging claims for economic loss on September 17, 2003. *See In re Baycol Prods. Litig.*, 218 F.R.D. 197, 213-14 (D. Minn. 2003). The Court held that, to prove they sustained an economic loss caused by Baycol, plaintiffs must show that "they were either injured by Baycol, or that Baycol did not provide them any health benefits." *Id.* The Court held that individual issues of fact predominate as to such claims, rendering class certification unwarranted. *Id.* at 214.

Having failed to move for certification pursuant to PTO 4, Mr. McCollins cannot now argue for class certification as if there were no history of argument and resolution of class certification issues in this MDL. Mr. McCollins cannot evade this Court's ruling by claiming that his putative class is different because it is limited to West Virginia residents. *See* Opp. at 8-10. The Court denied certification of a nationwide class for economic damages not only because of the variance of state laws, but also because *individual issues of fact predominate as to claims for economic loss. In re Baycol*, 218 F.R.D. at 213-14. Whether the putative class is nationwide or restricted to a particular jurisdiction, class certification is inappropriate. The Court's 2003 denial of certification for economic loss claims is the law of the case for putative Baycol class

actions coordinated through this MDL, and Mr. McCollins has not provided any legal or factual basis for revisiting this Court's order denying class certification. *See, e.g., Little Earth of the United Tribes, Inc. v. United States Dep't of Housing & Urban Development*, 807 F.2d 1433, 1440-41 (8th Cir. 1986) (law of the case doctrine prevents relitigation of issues settled by court, and serves to protect the expectations of the parties to the litigation); *see also In re Zyprexa Prods. Liab. Litig.*, 457 F. Supp. 2d 256, 273 (E.D.N.Y. 2006) (orders of transferee MDL court binding on cases pending before it as well as tag-along cases, even after cases are returned to their respective jurisdictions for ultimate resolution).

Indeed, Mr. McCollins does not seriously contest certification of his warranty and unjust enrichment claims, but instead repackages the same legal contentions that were presented to the Court for the Baycol master class. *See* Opp. at 3-24. Even if he did, the facts in this action confirm the propriety of the Court's denial of class certification for economic loss claims. Mr. McCollins concedes that the right of recovery for each individual class member would require a case-by-case determination (Opp. at 21) – the very individual determinations that led this Court to deny certification of the Baycol master class for economic loss claims in the first instance. *In re Baycol*, 218 F.R.D. at 213-14. Accordingly, consistent with its previous decision, this Court should affirm its past holding and deny certification for Mr. McCollins' proposed class.

B. Individual Issues of Fact Predominate as to A Claim Under the West Virginia Consumer Credit and Protection Act.

Even if the Court's ruling denying certification for classes seeking exclusively economic losses applied only to claims for breach of warranty and unjust enrichment, there is no basis upon which to depart from the rationale of that ruling when considering certification for a putative class action under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-6-101, *et seq*. Mr. McCollins does not dispute that (1) the WVCCPA requires a plaintiff to prove that some proscribed action caused him or her an economic loss, and (2) proof of an economic loss for which a plaintiff seeks a remedy under the WVCCPA can only be adduced on a plaintiff-by-plaintiff basis. *See* Opp. at 21. The reasons for denying certification of an economic loss class on breach of warranty and unjust enrichment theories apply in the context of the WVCCPA as well.

Instead of providing new facts or new law to support his request that the Court revisit its prior holding, Mr. McCollins simply urges this Court to follow the "guiding light" of the West Virginia Supreme Court's decision in *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003), certifying an economic loss class in another pharmaceutical products case. Opp. at 4, 10, 20-24. Among the many problems with Mr. McCollins' position is that this Court expressly considered and distinguished the West Virginia *Rezulin* decision when it denied certification of economic loss claims arising from the purchase and use of Baycol. *See In re Baycol*, 218 F.R.D. at 204 (noting the *In re West Virginia Rezulin* decision, and

declining to follow it based on the "unique nature" of the Baycol litigation); *accord Jensen v. Bayer AG*, 2003 WL 22962431, *1-5 (Ill. Cir. Ct. Dec. 15, 2003) (denying class certification for economic loss claims including claims for violation of consumer protection laws).

In *In re West Virginia Rezulin*, the West Virginia Supreme Court expressly found that the WVCCPA requires proof that an unfair trade practice *caused* some ascertainable loss, and that *each plaintiff* would have to show causation individually. *See In re West Virginia Rezulin*, 214 W. Va. at 74-75, 585 S.E.2d at 74-75; *see also Orlando v. Finance One of West Virginia, Inc.*, 179 W. Va. 447, 452-53, 369 S.E.2d 882, 887-88 (1988) (plaintiffs must show that alleged unfair practice under WVCCPA caused ascertainable loss). As this Court has held, proof of economic loss would require plaintiffs to prove, at a minimum, that they were injured by or did not receive any health benefit from Baycol. *In re Baycol*, 218 F.R.D. at 213-14. Whatever the evidence was before the West Virginia court at that stage in the *Rezulin* litigation, the evidence here confirms the correctness of this Court's decision that individual issues predominate as to Baycol economic loss claims.[2] Individual evidence

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[2] In any event, this Court is not bound by the decisions of state courts operating under their own procedural frameworks. Indeed the West Virginia court distinguished the standard for class certification in West Virginia from that found in the Federal Rules of Civil Procedure. *Hanna v. Plumer*, 380 U.S. 460, 470-74 (1965) (where state and federal rules of procedure conflict, federal rule

would be necessary as to each member of the putative class to determine whether that person benefited from or was injured by Baycol.

Indeed, Mr. McCollins' own experience serves as an example of the importance of individual proof to such claims. In contrast to his allegations on behalf of the class that Baycol was a "bad drug," Mr. McCollins does not dispute that Baycol worked for him. *See* Deposition of George McCollins ("McCollins Dep.") (Ex. C to Cross-Motion) at 111:11-113:8. His prescribing and treating physician testified that Baycol was the "perfect" statin for Mr. McCollins; further, the physician did not note any side effects experienced by Mr. McCollins attributable to Baycol. *See* Deposition of W. Michael Skeens ("Skeens Dep.") (Ex. A to Cross-Motion) at 77:16-20; 78:12-79:2; 86:8-13; 88:21-89:1. This evidence demonstrates that economic loss claims in this litigation can only be evaluated on a plaintiff-by-plaintiff basis.

C. Mr. McCollins Is Not an Adequate Class Representative.

Even if individual issues of fact did not predominate, and they do, Mr. McCollins could not represent this putative class. Mr. McCollins claims he is an adequate class representative because he "has retained experienced counsel" and "has the same interest in establishing Defendants' liability and seeks

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controls in action in federal court); *In re West Virginia Rezulin*, 214 W. Va. at 61, 585 S.E.2d at 61 (rejecting circuit court's reliance on Federal Rules in denial of class certification, finding the Federal Rules only "persuasive" authority).

the same types of remedies through the same theories of law" (Opp. at 14, 16-17). But the fact that Mr. McCollins has hired a lawyer and filed a complaint does not make him an adequate class representative.

First, Mr. McCollins concedes that he aims to represent individuals whose experiences taking Baycol are entirely foreign to his own experience:

- Mr. McCollins does not seek for himself the type of the damages alleged on behalf of the putative class. Mr. McCollins, individually, seeks only the return of money he spent in co-pay on purchasing his prescriptions of Baycol. *See, e.g.*, Opp. at 15. Nonetheless, Mr. McCollins has pleaded for the recovery of – on behalf of the putative class – general, compensatory, consequential, punitive and exemplary damages, attorneys' fees, and a refund of all purchase costs. *See* Compl. at 17.

- Mr. McCollins' complaint seeks economic, compensatory, and punitive damages for class members arising out of injuries proven to be a cause of their ingestion of Baycol (*see, e.g.*, Compl. ¶¶ 36(h), 51) even though there is no medical evidence that Mr. McCollins suffered any injury as a result of taking Baycol. *See* Cross-Motion at 15-16 (quoting and citing medical testimony).

- Mr. McCollins seeks to recover economic loss damages for individuals who relied on certain representations that purportedly proved untrue, or who succumbed to trade practices proscribed under West Virginia law. *See* Compl. ¶¶ 41-67.

> But Mr. McCollins concedes that he did not rely on any representations made by Bayer or GSK in purchasing Baycol and that he deferred to his treating physician in deciding whether to purchase Baycol, and testimony evidences that his prescribing physician did not rely on representations by Bayer or GSK either. *See* Cross-Motion at 13-14, 16-17.

Mr. McCollins cannot represent absent class members whose alleged experiences and damages differ significantly from his own. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997) (putative class representative with insufficient commonality in interest cannot adequately protect absent class members' due process).

Second, Mr. McCollins has not demonstrated the vigor with which a class representative must pursue an action on behalf of class members. Indeed, after defendants presented evidence in support of their motion for summary judgment on Mr. McCollins' individual claim, he responded with only the bare assertion that genuine issues of material fact warrant a trial of his individual claim. *See id.*; *see also* Opp. at 24. Indeed, he withdrew the only purported case-specific expert he has proffered in this action, Dr. Gregory Clarke, on October 5, 2007. It is axiomatic that a plaintiff cannot rest on his pleadings in such circumstances. *See* Section II, *infra*. Mr. McCollins' failure to present any evidence in support of his claim demonstrates his inadequacy as a class representative.

In sum, certification of the putative class should be denied because (a) Mr. McCollins seeks to relitigate issues on which this Court has already ruled, (b)

individual issues of fact predominate as to his claims, and (c) he is an inadequate representative of the proposed class.

II. THERE ARE NO TRIABLE ISSUES OF FACT SUPPORTING PLAINTIFF'S INDIVIDUAL CLAIMS.

Mr. McCollins admits that he must demonstrate his right to recovery (Opp. at 21), but makes no effort to do so in responding to Bayer and GSK's motion to enter judgment against Mr. McCollins on his individual claims. Mr. McCollins does not contest the facts that preclude his recovery in this action:

- Baycol did not injure Mr. McCollins, and in fact benefited his well-being (*see* Cross-Motion at 15-16);

- Mr. McCollins did not rely on any representations made by Bayer or GSK that became a basis for his use of Baycol (*see* Cross-Motion at 16-17); and

- Mr. McCollins gained an economic *advantage* from taking Baycol versus other statin medications (*see* Cross-Motion at 17-18).

As set forth in Bayer and GSK's Cross-Motion, Mr. McCollins has no medical evidence that Baycol caused him any harm. *See, e.g.*, Skeens Dep. (Ex. A to Cross-Motion) at 77:16-20; 78:12-79:2; 86:8-13; 88:21-89:1. Indeed the only medical evidence shows that Mr. McCollins' health benefited from Baycol and that he suffered no ill effects from taking Baycol. *See, e.g., id.*; *see also* McCollins Dep. (Ex. C to Cross-Motion) at

111:11-113:8. Mr. McCollins does not respond to any of these facts, and has withdrawn the only case-specific expert he has proffered in this litigation to boot, contrary to the requirements set forth by this Court and West Virginia law. *See Banfi v. American Hospital for Rehabilitation*, 207 W. Va. 135, 140-41, 529 S.E.2d 600, 605-06 (2000) (requiring expert evidence to prove medical negligence); *In re Baycol Prods. Litig.*, 321 F. Supp. 2d 1118, 1124-27 (D. Minn. 2004) (requiring medical expert testimony to substantiate claims).

As this Court has held, Mr. McCollins (like all plaintiffs seeking economic damages only) must show that he was injured by Baycol or did not receive any health benefit from Baycol in order to recover damages for economic loss. *In re Baycol*, 218 F.R.D. at 213-14; *accord Orlando*, 179 W. Va. at 452-53, 369 S.E.2d at 887-88 (summary judgment appropriate where plaintiffs did not provide evidence that lender's unfair practice caused ascertainable loss under WVCCPA). Mr. McCollins has not presented any evidence that he did not receive exactly what he expected from Baycol – a medication that would control his cholesterol and not cause him side effects. His assertion that the Baycol he received was "different than" or "inferior to" the medication for which he bargained is unaccompanied by even the most remote effort to support it with facts. *See* Opp. at 24. There are no genuine issues present to support a trial of Mr. McCollins' individual claims, and the Court should enter judgment against Mr. McCollins. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (summary judgment appropriate when no genuine issue of material fact supports a necessary element of a cause of action); *Anderson v. Liberty Lobby*, 477 U.S. 242,

248-49 (1986) (a party cannot rest on allegations unsupported in fact to avoid summary judgment).

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Bayer and GSK's memorandum in support of their Motion to Enter Judgment Against Plaintiff, Bayer and GSK respectfully request that the Court deny class certification and enter judgment against plaintiff George McCollins and in favor of Bayer and GSK on Mr. McCollins' individual claims.

Dated: December 21, 2007

Respectfully submitted,

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* * *

[*Certificate of Service Omitted in Printing of this Appendix*]

OA450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
District of Minnesota

Case Number: 02-199 MJD/SRN

[Filed August 26, 2008]

GEORGE F. MCCOLLINS, individually, and on behalf of all others similarly situated	)
V.	)
BAYER CORPORATION, a foreign corporation authorized to do business in West Virginia; BAYER AG, a foreign corporation; and GLAXOSMITHKLINE plc, a foreign corporation	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:
1. Plaintiff's Motion to Remand is **DENIED**;
2. Bayer and GSK's Cross-Motion to Deny Class Certification and Enter Judgment Against the

Plaintiff is **GRANTED**. This matter is **DISMISSED WITH PREJUDICE.**

August 26, 2008 RICHARD D. SLETTEN, CLERK
Date

s/Amy Linner
(By) Amy Linner, Deputy Clerk

N:\wp{wp}.bk2 Form Modified: 09/16/04

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Prehearing Conference Program

The United States Court of Appeals for the Eighth Circuit has established an early intervention Prehearing Conference Program. The purpose of the program is twofold: (1) to facilitate settlement discussions in civil cases by providing an impartial atmosphere for an open discussion of the case and alternative methods of disposition and (2) to promote the delineation of issues, early resolution of procedural problems, and effective administration of an appeal throughout the appellate process. See 8th Cir. R. 33A.

The program is directed by Mr. John Martin. Mr. Martin screens newly filed appeals based on information furnished by both appellants and appellees in the court's Appeal Information Forms A and B. Contact with counsel is by telephone and in personal conferences held in several cities throughout the Circuit. All communications with Mr. Martin are confidential. Counsel can openly discuss and evaluate the issues and explore alternatives in a non-adversarial setting without fear that the subsequent processing of the appeal or ultimate disposition of the case will be adversely affected by participation in the program.

Participation in the program is voluntary. However, the Court strongly encourages your participation and cooperation. Over the past twenty years, the program has enabled many appellate litigants to achieve mutually satisfactory resolution of certain issues or an overall settlement prior to progressing through all

stages of the appellate process. Issue delineation enables counsel to focus only on those issues that need judicial resolution. The program has helped relieve the ever-increasing caseload confronting the Court, and it has also saved litigants and attorneys substantial amounts of time and money.

In order for the program to function effectively certain information must be provided at the initiation of the appeal. *Eighth Circuit Rule 3B directs each civil appellant to: (1) file a completed Appeal Information Form A with the Notice of Appeal at the time the Notice is filed with the District Court clerk and (2) forward a copy of the completed Form A and a copy of Appeal Information Form B to the appellee for completion.* Appellee may complete Form B and send it to the clerk of the Court of Appeals. If you have any questions about the Prehearing Conference Program or the Appeal Information Forms, please contact Mr. Martin at (314)-244-2499.

Forms A and B are available from the District Court clerk and the Court of Appeals clerk and can be found on the forms page of the Court of Appeals' website at:
http://www.ca8.uscourts.gov and the District Court's website at: http://www.mnd.uscourts.gov.

October 27, 2004

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Form Modified 10/27/04

UNITED STATES DISTRICT COURT
District of Minnesota

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Wendy S. Osterberg, Chief Deputy Clerk

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118 South Mill Street
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CIVIL NOTICE

The appeal filing fee is $455.00. If you are indigent, you can apply for leave to proceed in forma pauperis, ("IFP").

The purpose of this notice is to summarize the time limits for filing with the District Court Clerk's Office a Notice of Appeal to the Eighth Circuit Court of Appeals from a final decision of the District Court in a civil case.

This is a summary only. For specific information on the time limits for filing a Notice of Appeal, review the applicable

federal civil and appellate procedure rules and statutes.

Rule 4(a) of the Federal Rules of Appellate Procedure (Fed. R. App. P.) requires that a Notice of Appeal be filed within:

1. Thirty days (60 days if the United States is a party) after the date of "entry of the judgment or order appealed from;" or

2. Thirty days (60 days if the United States is a party) after the date of entry of an order denying a timely motion for a new trial under Fed. R. Civ. P. 59; or

3. Thirty days (60 days if the United States is a party) after the date of entry of an order granting or denying a timely motion for judgment under Fed. R. Civ. P. 50(b), to amend or make additional findings of fact under Fed. R. Civ. P. 52(b), and/or to alter or amend the judgment under Fed. R. Civ. P. 59; or

4. Fourteen days after the date on which a previously timely Notice of Appeal was filed.

If a Notice of Appeal is not timely filed, a party in a civil case can move the District Court pursuant to Fed. R. App. P. 4(a)(5) to extend the time for filing a Notice of Appeal. This motion must be filed no later than 30 days after the period for filing a Notice of Appeal expires. If the motion is filed after the period for filing a Notice of Appeal expires, the party bringing the motion must give the opposing parties notice of it. The District Court may grant the motion, but only if

excusable neglect or good cause is shown for failing to file a timely Notice of Appeal.

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Form Modified 5/22/07

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed October 31, 2008]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Black, et al. v. Bayer Corp., et al.	)
	)

BAYER CORPORATION'S NOTICE OF MOTION AND EXPEDITED MOTION FOR PERMANENT INJUNCTION

PLEASE TAKE NOTICE that Defendant Bayer Corporation ("Bayer") hereby moves the Honorable Judge Michael J. Davis, United States District Court, U.S. Courthouse, Suite 14E, 300 South Fourth Street, Minneapolis, Minnesota, for an Order pursuant to Federal Rule of Civil Procedure 65 and the Court's statutory authority under 28 U.S.C. §§ 1651 and 2283 permanently enjoining Keith Smith and Shirley Sperlazza from seeking certification of an economic loss class of West Virginia Baycol purchasers in the lawsuit styled *Keith Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (Cir. Ct. Brooke Co., W. Va.). Bayer seeks such equitable relief in order to protect this Court's jurisdiction, preserve the integrity of its final judgment denying certification of an identical class in *McCollins*

v. Bayer Corporation, et al., No. 02-0199 (D. Minn.), and protect Bayer from having to defend duplicative litigation with the risk of inconsistent judgments. The reasons supporting Bayer's motion are more fully outlined in the accompanying memorandum.

WHEREFORE, Bayer respectfully requests that this Court grant its motion for permanent injunction and prohibit Keith Smith and Shirley Sperlazza from pursuing certification of an economic loss class in *Smith. v. Bayer Corp.*. Because class certification arguments in *Smith v. Bayer Corporation, et al.* are scheduled for hearing in on December 10, 2008, Bayer respectfully requests expedited consideration of the instant motion for permanent injunction.

Dated: October 31, 2008

Respectfully Submitted,

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[Certificate of Service Omitted in Printing of this Appendix]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed October 31, 2008]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Black, et al. v. Bayer Corp., et al.	)
	)

MEMORANDUM IN SUPPORT OF BAYER CORPORATION'S EXPEDITED MOTION FOR A PERMANENT INJUNCTION

Two months ago, on August 25, 2008, this Court ruled that West Virginia Baycol purchasers could not litigate common law or statutory economic loss claims as a West Virginia class. *See* Memorandum of Law & Order, *McCollins v. Bayer Corp., et al.*, No. 02-0199, at 11-12 (D. Minn. Aug. 25, 2008) (Ex. A) (hereinafter "*McCollins* Order"). Plaintiffs did not appeal that ruling, which has now become final and binding as to all represented parties. Nevertheless, on September 30, 2008, class members Keith Smith and Shirley Sperlazza moved for certification of the same economic loss class in the state courts of West Virginia.

This Court should enjoin Mr. Smith and Ms. Sperlazza from pursuing certification of the state court

action to protect this Court's judgment in *McCollins*, to prevent serial relitigation of an issue already decided in this forum, and to protect Bayer from defending duplicative litigation in state court with the possibility of inconsistent judgments. *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1018 (8th Cir. 2002); *In re Bridgestone / Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003). Bayer further requests that the Court set an expedited briefing schedule and an early date for argument, because a hearing on Mr. Smith and Ms. Sperlazza's motion for class certification is set for December 10, 2008, in the Circuit Court of Brooke County, West Virginia.

STATEMENT OF THE CASE AND BACKGROUND OF RELATED LITIGATION

Despite this Court's August 25, 2008, ruling that West Virginia Baycol purchasers may not pursue an economic loss class action under the laws of West Virginia, Keith Smith and Shirley Sperlazza and their counsel seek to circumvent that judgment by moving for identical relief in the state courts of West Virginia. A brief description of both cases establishes the basis for Bayer's Motion for Permanent Injunction.

A. *McCollins v. Bayer Corp.*

On August 22, 2001, class representatives Michael Black, Peggy Ann Mays, and George McCollins[1] filed

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[1] This case originally was filed on behalf of these three plaintiffs, acting individually and on behalf of all others similarly situated. The amended complaints filed in 2001 and 2003 omitted plaintiff Peggy Ann Mays. Plaintiff Michael Black was dismissed with prejudice by this Court on January 14, 2005.

a putative class action in the Circuit Court of Cabell County, West Virginia, seeking to represent a consumer class of "all persons in West Virginia who purchased the drug cerivastatin under the brand name 'Baycol' between February 1998 and August 8, 2001, or their estates, administrators or other legal representatives, heirs or beneficiaries." Complaint, *Black v. Bayer Corp., et al.*, No. 01-C-0725, ¶ 30 (Cir. Ct. Cabell County, W. Va. Aug, 22, 2001) (Ex. B). On behalf of this class, plaintiffs sought recovery for economic losses allegedly caused by Bayer's breach of warranties and unjust enrichment in violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code. § 46A-6-101. *Id.* ¶¶ 40, 45, 49, and 63. Plaintiffs specifically disclaimed any right to recovery for personal injuries, focusing their quest for class certification solely on the viability of an economic loss class. *Id.* ¶ 30 ("Plaintiffs expressly disclaim any intent to seek any recovery for personal injuries suffered or which may be suffered by any class member").

Bayer removed this case to the Southern District of West Virginia on September 19, 2001, and the case was transferred to this MDL for coordinated proceedings on January 16, 2002. After removal and transfer, plaintiffs continued to seek certification of an economic loss class of West Virginia Baycol purchasers. *See* Amended Class Action Complaint, *Black v. Bayer Corp., et al.*, No. 3:01-0856, ¶¶ 30, 40, 45, 49, and 63 (S.D. W. Va. Oct. 19, 2001) (setting forth the same proposed class and rights to recovery) (Ex. C); Second Amended Class Action Complaint, *Black v. Bayer Corp., et al.*, No. 02-0199, ¶ 34, 44, 49, 53, and 67 (D. Minn. Mar. 17, 2002) ("*McCollins* Second Amended Complaint") (Ex. D) (same).

Following case-specific discovery and a motion to remand by plaintiffs, Bayer moved this Court for an order denying certification of the proposed class, arguing that individualized issues of efficacy and alleged injury predominated, making the class device an inferior mechanism for resolving the economic loss claims at issue. This Court agreed, denied the requested class certification, and dismissed the case with prejudice upon a finding that the remaining named plaintiff could not establish entitlement to economic losses. *See McCollins* Order (Ex. A) at 10-12, 19. Specifically, this Court held that, because "plaintiffs would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any health benefits" in order to establish entitlement to economic damages under West Virginia law, individualized questions of fact precluded class certification. *Id.* at 10, 12 (finding that "[i]ndividual evidence would be necessary as to each member of the putative class to determine whether the individual person benefited from or was injured by Baycol"). The Court specifically held that, pursuant to the WVCCPA, each plaintiff would have to demonstrate that Baycol was "something other than what he bargained for" – a key individualized issue requiring proof of causation and damages on a plaintiff-by-plaintiff basis. *Id.* at 18 (applying *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 74-75, 585 S.E.2d 52, 74-75 (W. Va. 2003)).

Neither the class representative, class counsel, nor any absent class member sought to appeal this decision within the 30-day period established by the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 4(a)(1)(A). Thus, the judgment became final and conclusive on September 25, 2008 – just five days before Keith Smith and Shirley Sperlazza filed their

motion for certification of the same economic loss class in the state courts of West Virginia on September 30, 2008.

B. *Smith v. Bayer Corp.*

Plaintiffs Keith Smith, Shirley Sperlazza, and Nancy Gandee[2] filed their own class complaint against Bayer in the Circuit Court of Brooke County, West Virginia. *See* Complaint, *Smith v. Bayer Corp., et al.*, No. 01-C-191 (1-3) JPM (Cir. Ct. Brooke County, W. Va., Sept. 20, 2001) (Ex. E). The *Smith* plaintiffs sought certification of a class of "all West Virginia residents and others who have ingested Cerivastatin, sold under the trade name 'Baycol' in West Virginia." *Id.* ¶ 3. Plaintiffs originally sought recovery for personal injury, medical monitoring, and economic loss.[3]

Seven years later, on September 30, 2008, plaintiffs filed a motion seeking certification of only an economic loss class. *See* Plaintiffs' Motion for Certification of Class Action, *Smith v. Bayer Corp.*, No. 01-C-191 (1-3) JPM (Cir. Ct. Brooke County, W. Va. Oct. 1, 2008) (Ex. F) (hereinafter "*Smith* Motion"). Specifically, plaintiffs

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[2] Having settled her claims against Bayer, Nancy Gandee is no longer a representative or member of the putative class in *Smith*.

[3] When filed, plaintiffs named Bayer Corporation and two local entities - West Virginia University Board of Local Governors and Dr. Patrick Knost – as defendants. Due to the presence of the local defendants, Bayer could not remove this case to the MDL. When plaintiff Nancy Gandee settled her claims in July 2003, the local defendants were dismissed from the case – well after the one-year period for removal prescribed in 28 U.S.C. § 1446.

moved for certification of a class of "all West Virginia residents who purchased the drug Baycol in West Virginia . . . with respect to their consumer protection act claims as set forth in the complaint." *Id.* at 5. Counsel for Mr. Smith and Ms. Sperlazza has explained that this encompasses their claims under the WVCCPA and for common law fraud and breach of warranties. Plaintiffs pray for "compensation for the improper charge [for purchases of Baycol] perpetrated upon" putative class members due to Bayer's alleged misconduct, as well as punitive damages. *Id.* at 7. Plaintiffs did not seek class certification of injury and medical monitoring claims. *See id.* at 5, 7.

Thus, the economic loss class that Mr. Smith and Ms. Sperlazza now seek to represent is identical to the consumer class of West Virginia Baycol purchasers that this Court previously rejected in *McCollins*.

ARGUMENT

I. THIS COURT HAS THE AUTHORITY TO ENJOIN SMITH AND SPERLAZZA FROM RELITIGATING THE PROPRIETY OF A WEST VIRGINIA ECONOMIC LOSS CLASS.

Almost exactly a year ago, this Court was called upon to exercise its authority under the All Writs Act, 28 U.S.C. § 1651, and the "relitigation" exception to the Anti-Injunction Act, 28 U.S.C. § 2283. This Court's decision in *Innovative Medical Systems, Inc. v. Augustine Medical, Inc.*, No. 04-4705, 2007 WL 3121033 at *3 (D. Minn. Oct. 23, 2007), succinctly describes the scope of that authority:

> The All Writs Act empowers this Court to protect the res judicata and collateral estoppel effects of its prior judgments by enabling it to issue all writs necessary or appropriate in aid of their jurisdiction. *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1018 (8th Cir. 2002). This power allows the Court to issue an order enjoining relitigation of its judgment, even if the case in which the judgment issued is closed or on appeal. *Id.* The Court's power to enjoin relitigation extends to relitigation in state courts and in other forums, including arbitration. *In Re Y & A Group Secs. Litig.* 38 F.3d 380, 382 (8th Cir. 1994); *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887 (8th Cir. 2000); *Time Warner Cable, Inc. v. City of Minneapolis*, No. 06-484, 2006 WL 1579941, at *5 (D. Minn. June 2, 2006) (Davis, J.).

Because "denial of class certification stands as an adjudication of one of the issues litigated," *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 336 (1980), federal courts have the power under the All Writs Act to enjoin serial relitigation of class certification decisions. *See In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 220-21 (8th Cir. 1977) ("unfavorable class action determination [can] supply the basis for a collateral estoppel bar"). Indeed, courts across the nation have applied collateral estoppel to bar subsequent efforts to certify a putative class for which certification already has been denied. *See, e.g., Bridgestone*, 333 F.3d at 766-67; *Canady*, 282 F.3d at 1017; *In re Dalkon Shield Punitive Damages Litig.*, 613 F. Supp. 1112, 1115-19 (E.D. Va. 1985) (Mehrige, J.); *Alvarez v. May Dept. Stores Co.*, 143 Cal. App. 4th 1223, 1240 (Cal. Ct. App. 2006). This Court,

too, should find that plaintiffs Smith and Sperlazza are collaterally estopped from relitigating certification of a West Virginia economic loss class and enjoin them from seeking certification in their West Virginia state court action.

II. PLAINTIFFS SMITH AND SPERLAZZA ARE COLLATERALLY ESTOPPED FROM SEEKING CERTIFICATION OF A WEST VIRGINIA ECONOMIC LOSS CLASS.

Collateral estoppel bars reconsideration of an issue previously decided by the same or a different court if four conditions are met: "(1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (W. Va. 1995).[4] Here, all conditions precedent are met, and Mr. Smith and Ms. Sperlazza are estopped from pursuing relitigation of their proposed economic loss class in the state courts of West Virginia.

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[4] Because this Court's jurisdiction in *McCollins* was based on the diversity of the parties, state substantive law applies. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-9 (2001); *Sensormatic Sec. Corp. v. Sensormatic Elec. Corp.*, 273 Fed. Appx. 256, 261 (4th Cir. 2008).

A. Smith and Sperlazza Are Trying To Relitigate the Same Issues.

The *Smith* and *McCollins* cases present the same issues:

• Mr. Smith and Ms. Sperlazza have asked a West Virginia state court to certify the same class of Baycol purchasers that this Court declined to certify in *McCollins*: a class of West Virginia Baycol purchasers. *Compare Smith* Motion (Ex. _) at 5, *with McCollins* Second Amended Complaint (Ex. D) ¶ 34.

• Mr. Smith and Ms. Sperlazza seek certification for purposes of trying the same causes of action asserted in *McCollins*: claims for economic loss. *Compare Smith* Complaint (Ex. E) ¶¶ 48, 51, 56, and 58 (asserting claims for statutory and common law fraud and breach of warranties), *with McCollins* Second Amended Complaint (Ex. D) ¶¶ 44, 49, 53, and 67 (asserting claims for statutory fraud and breach of warranties).

• Mr. Smith and Ms. Sperlazza describe their claims in the same terms as *McCollins*, alleging that they were injured because they bought Baycol only because Bayer misrepresented Baycol as a safe and effective medicine. *Compare Smith* Motion (Ex. F) at 7 ("Plaintiffs would not have purchased Baycol with knowledge of the aforesaid [misrepresentations] and believe they were misled to buy this defective drug"), *with McCollins* Second Amended Complaint (Ex. D) ¶ 67 (alleging that, due to Bayer's "unfair and deceptive trade practices and/or consumer fraud . . . Plaintiffs and the Class have suffered . . . economic loss that includes the purchase price of [Baycol]").

• Mr. Smith and Ms. Sperlazza contend, as did Mr. McCollins, that certification is proper because, under West Virginia law, it does not matter whether plaintiffs or absent class members benefited from or were harmed by Baycol; rather, they assert that liability can be established solely on the basis of Bayer's alleged misconduct. *Compare Smith* Motion (Ex. F) at 23 ("plaintiffs' claims arise out of corporate conduct that was directed at all the plaintiffs and all class members alike"), *with* Reply in Support of Remand and Opposition to Cross-Motion to Deny Class Certification, *McCollins v. Bayer Corp.*, No. 02-0199, at 22-23 (D. Minn. June 11, 2007) ("*McCollins* Opp.") (Ex. G) (arguing that Bayer made deceptive misrepresentations to induce plaintiffs to buy Baycol, entitling them to economic loss damages).

Thus, plaintiffs Smith and Sperlazza are seeking to relitigate in state court the same issues that were presented in *McCollins* and decided against plaintiffs by this Court. Because the issues in the two cases are identical, Bayer has established the first requirement for application of collateral estoppel. *See Canady*, 282 F.3d at 1015-16; *Lee v. Criterion Ins. Co.*, 659 F. Supp. 813, 822-23 (S.D. Ga. 1987); *Dalkon Shield*, 613 F. Supp. at 1115-16; *Haba v. Big Arm Bar & Grill, Inc.*, 196 W. Va. 129, 133, 468 S.E.2d 915, 919 (W. Va. 1996).

Mr. Smith and Ms. Sperlazza cannot avoid estoppel by arguing that their complaint contains an additional cause of action – common law fraud – that was not included in *McCollins*. "The same cause of action framed in terms of a new legal theory is still the same cause of action." *Canady*, 282 F.3d at 1015 (quoting *N.A.A.C.P. v. Metro. Council*, 125 F.3d 1171, 1174 (8th

Cir. 1997)). *See generally Taylor v. Sturgell*, __ U.S. __, 128 S. Ct. 2161, 2171 (2008) ("Issue preclusion . . . bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim") (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)); *Holloman v. Nationwide Mut. Ins. Co.*, 217 W. Va. 269, 274, 617 S.E.2d 816, 821 (W. Va. 2005) ("Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit"); *Haba*, 196 W. Va. at 133, 468 S.E.2d at 919 (holding that if, "[i]n all material aspects," the same factual issues arise in the current action as were litigated in the prior action, the case is precluded, regardless of the name the parties give to the factual issues); *see also Bryan v. BellSouth Comms., Inc.*, 492 F.3d 231, 237-38 (4th Cir. 2007) (authorizing injunction of state court litigation despite differences in terminology that plaintiffs attached to subsequent claims).

Nor can Mr. Smith and Ms. Sperlazza salvage their putative class by arguing that West Virginia courts may apply the West Virginia version of Rule 23 differently.[5] To determine whether a class could be

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[5] Although West Virginia's Rule 23 tracks the federal rule, the West Virginia Supreme Court of Appeals has held that opinions construing the Federal Rules are only "persuasive" authority. *In re W. Va. Rezulin*, 214 W.Va. at 61, 585 S.E.2d at 61. Despite the potential difference in interpretation, "a party cannot avoid the preclusive effect of a denial of class certification rendered by a federal court . . . by filing suit against the same party in . . . state

certified in *McCollins,* this Court had to consider "what the plaintiffs will have to prove and how the plaintiffs will have to prove it." *Amos v. Geico Corp.*, No. 06-1281, 2008 WL 4425370, at *7 (D. Minn. Sept. 24, 2008); *accord In re W. Va. Rezulin*, 214 W. Va. at 63, 585 S.E.2d at 63. In particular, this Court had to decide whether members of the putative class would be required to prove that they were actually harmed by, or at least did not benefit from, Baycol. This Court decided that issue of law against plaintiff McCollins. *See McCollins* Order (Ex. A) at 10-12, 17-19 (finding that plaintiffs pursuing economic loss claims under West Virginia law must establish lack of efficacy or actual injury) (citing *In re W. Va. Rezulin*, 214 W. Va. at 74-75, 585 S.E.2d at 74-75); *see also In re Baycol Prods. Litig.*, 218 F.R.D. 197, 213-214 (D. Minn. 2003) (holding that individualized issues of fact precluded certification of an economic loss class, because "Plaintiffs would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any heath benefits"); Memorandum of Law & Order, *Ballard v. Bayer Corp.*, No. 03-5984, at 21-22 (D. Minn. Oct. 24, 2008) (Ex. H) (finding that plaintiffs must prove that Baycol lacked efficacy or caused injury to establish liability for economic losses under West Virginia law); *accord Jones v. Purdue Pharma L.P.*, No. Civ. A. 5:01-1246, 2002 WL 32097528, at *2 (S.D.W. Va. Feb. 27, 2002) (noting that West Virginia law requires case-specific proof of causation, regardless of whether liability is pursued under a claim for fraud, warranty, or a violation of the

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court and pointing to largely illusory differences between statutes that are designed for essentially identical purposes." *Lee v. Criterion Ins. Co.*, 659 F. Supp. 813, 823 (S.D. Ga. 1987).

WVCCPA); *In re W. Va. Rezulin*, 214 W. Va. at 74-75, 585 S.E.2d at 74-75 (requiring each plaintiff to show ascertainable loss by proof of case-specific causation under the WVCCPA).

That substantive decision is inextricably intertwined with this Court's denial of class certification in *McCollins*. *See Bridgestone*, 333 F.3d at 768 ("Determining the permissible scope of litigation is as much substantive as it is procedural"). Plaintiffs' bid for class certification in *Smith* is premised on the same issue of substantive law; they contend that individual questions of efficacy and injury cannot give rise to individual issues of fact under West Virginia law, because plaintiffs may recover in spite of evidence that Baycol effectively lowered their cholesterol while causing them no injury. *Compare Smith* Motion (Ex. F) at 23 ("All consumers of the defendants' services would have claims against the defendants because of [the alleged] deceptive acts regardless of whether they relied on the statements," and thus, "each plaintiff will be entitled to statutory damages"),[6] *with McCollins* Opp. (Ex. G) at 22 (asserting that the "ascertainable loss" requirement in the WVCCPA "does not require a plaintiff to prove that a product did not 'work' or that it caused a personal injury"). This Court's ruling on that substantive issue – which was critical to determining what plaintiffs would have to prove and

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[6] *See also* Plaintiff's Response to Bayer's Motion for Summary Judgment, *Ballard v. Bayer Corp.*, No. 03-5984, at 12-14 (D. Minn. Feb. 20, 2008) (Ex. I) (setting forth argument by Smith and Sperlazza's counsel, subsequently rejected by this Court, that plaintiffs need not prove reliance or individualized causation to establish a violation of the WVCCPA) (citing *In re W. Va. Rezulin*, 214 W. Va. at 74-75, 585 S.E.2d at 74-75).

how they would prove it – is precisely the issue that Mr. Smith and Ms. Sperlazza now seek to relitigate in West Virginia.

In pursuing their class claims in state court, Mr. Smith and Ms. Sperlazza are simply hoping another judge will decide the same issue differently. The "relitigation" exception to the Anti-Injunction Act "permits a federal court to issue an injunction that will stop such a process in its tracks and hold *both* sides to a fully litigated outcome, rather than perpetuating an asymmetric system in which class counsel can win but never lose." *Bridgestone*, 333 F.3d at 767 (emphasis in original). Because this Court already has decided that a West Virginia economic loss class cannot be certified, collateral estoppel applies.

B. Smith and Sperlazza Had Their Position on Class Certification Fully and Fairly Represented in *McCollins*.

In *Bridgestone*, plaintiffs argued that they were entitled to relitigate class certification *seriatim*, because absent class members are not bound by a decision denying class certification. *Bridgestone*, 333 F.3d at 767. The Court rejected plaintiffs' claim that "the legal system entitles them to the benefit of this heads-I-win, tails-you-lose situation." *Id.* Rather, the Seventh Circuit held that "unnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them." *Id.* at 768. *See also Williams v. Gen. Elec. Cap. Auto Lease, Inc.*, 159 F.3d 266, 274-75 (7th Cir. 1998) (holding that a district court may enjoin a subsequent state-court suit brought by adequately-represented

absent class members from the first action). *Cf. Miller*, 194 W. Va. at 9, 459 S.E.2d at 120 (holding that, under West Virginia law, both parties *and their privies* are precluded from litigating an issue conclusively decided in a prior action).

Absent class members are bound by a denial of class certification when their interests were adequately represented with respect to the certification decision. *Bridgestone*, 333 F.3d at 768-69. Here, the interests of Mr. Smith and Ms. Sperlazza with respect to obtaining class certification were fully and adequately represented by Mr. McCollins.[7]

As the United States Supreme Court explained in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), Rule 23(a)(4) requires the Court to determine whether the named plaintiff is part of the class, has the same interests as absent class members, and suffered the same alleged injury as absent class members. *Id.* at 625-26; *see also Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982) (same). The Court's duty is to ferret out any conflicts that might prevent the named plaintiff from adequately representing those absent class members. *Amchem*, 521 U.S. at 626-27; *see generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) ("The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest"); *DeBoer v.*

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[7] This Court "assume[d], without deciding" that Mr. McCollins was an adequate class representative for purposes of litigating the merits of the claims plaintiffs sought to certify. *McCollins* Order (Ex. A) at 8.

Mellon Mortgage Co., 64 F.3d 1171, 1175 (8th Cir. 1995) (finding adequacy of representation when named representative and class counsel had no conflicts with absent class members and "vigorously pursued" the issue in dispute). No conflicts exist here. To the contrary, the interests of the *Smith* and *McCollins* plaintiffs are perfectly aligned.

First, there can be no serious dispute that plaintiffs Smith and Sperlazza – as West Virginia Baycol purchasers – were members of the putative *McCollins* economic loss class – the *same class* that they now seek to certify in the West Virginia state court. *Compare Smith* Motion (Ex. F) at 5, *with McCollins* Second Amended Complaint (Ex. D) ¶ 34, *and McCollins* Order (Ex. A) at 3.

Second, Mr. McCollins claimed the same alleged injury as the state court plaintiffs here. The doctors who prescribed Baycol for all three plaintiffs testified that they suffered no injury caused by the medicine and that it lowered their cholesterol. *See* Dep. of Dr. W. Michael Skeens (Ex. J) at 77:16-20, 78:12-79:2, 86:8-13 (McCollins); Dep. of Patsy Cipoletti, M.D., Nov. 1, 2006 (Ex. K) at 12:24-13:16, 38:22-39:9 (Smith); Dep. of Patsy Cipoletti, M.D., Oct. 20, 2006 (Ex. L) at 16:10-17, 68:16-69:23 (Sperlazza). All three plaintiffs even took the same Baycol dose (0.4 mg). *See* Cipoletti Nov. 1, 2006 Dep. (Ex. K) at 38:22-39:9; Dep. of Shirley Sperlazza (Ex. M) at 73:5-21.

Therefore, *third*, Mr. McCollins had the same interest as plaintiffs Smith and Sperlazza. His claim, like theirs, rested on the premise that the purchase of Baycol, without more, could constitute a compensable injury. *Compare McCollins* Opp. (Ex. G) at 22, *and*

McCollins Order (Ex. A) at 10-12, *with Smith* Motion (Ex. F) at 22-23 . And, his argument for class certification, like theirs, turned on the claim that plaintiffs need not individually prove injury and causation, and therefore, these individual issues could not predominate. *Compare McCollins* Opp. (Ex. G) at 22, *and McCollins* Order (Ex. A) at 10-12, *with Smith* Motion (Ex. F) at 22-23.

Thus, not only is there no conflict; the interests of plaintiffs McCollins, Smith and Sperlazza are in perfect alignment. Moreover, as this Court is aware, Mr. McCollins vigorously contested class certification. Thus, this is not an instance in which a plaintiff in a subsequent proceeding seeks state court certification of a narrower class. *See generally Bridgestone*, 333 F.3d at 765-66 (declining to enjoin plaintiffs from seeking certification of statewide classes in state court, when federal court ruling had denied certification of a nationwide class). The interests of plaintiffs Smith and Sperlazza were fully and adequately represented in *McCollins* with respect to the issue that they now seek to relitigate.[8]

Because Mr. Smith, and Ms. Sperlazza were adequately represented in *McCollins*, the identical

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[8] As this Court is aware, Bayer challenged the adequacy of Mr. McCollins to represent absent class members in a class trial who allege an actual injury caused by Baycol or otherwise had conflicting interests. For the same reason, Bayer has argued that Mr. Smith and Ms. Sperlazza cannot represent absent class members with conflicting interest in a class trial. *See* Opposition to Plaintiffs' Motion for Certification of Class Action, *Smith v. Bayer Corp.*, No. 01-C-191(1-3) JPM, at 28-29 (Cir. Ct. Brooke County, W. Va., Oct. 30, 2008) (Ex. N).

economic loss class that they now seek to represent in West Virginia state court is precluded. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390-91 (9th Cir. 1992) (refusing to second-guess a prior decision that counsel adequately represented a class on collateral attack of the prior judgment); *Haba*, 196 W. Va. at 136, 468 S.E.2d at 922 ("Because one of the purposes underlying the collateral estoppel doctrine is to limit repetitive litigation and encourage joinder, courts have concluded that a plaintiff may be denied collateral estoppel benefits if he cannot advance a substantial reason why he did not join in the original litigation.") (quoting *Conley v. Spillers*, 171 W. Va. 584, 592, 301 S.E.2d 216, 223 (W. Va. 1983)).[9]

C. The *McCollins* Class Certification Denial is a Final Judgment.

This Court's decision denying certification of the putative consumer class of West Virginia Baycol purchasers in *McCollins* is a final judgment entitled to preclusive effect under the laws of West Virginia.[10] After this Court denied class certification and dismissed the underlying claims, the *McCollins* class

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[9] Moreover, the Masters Law Firm, LC, has represented other named West Virginia plaintiffs in the MDL and was or should have been aware of the Court's Orders in the MDL. *See, e.g., Ballard* Order (Ex. H) at 1 (identifying The Masters Law Firm, LC as counsel for plaintiff Maria Ballard).

[10] *Compare Piper Aircraft*, 551 F.2d at 219-21 (holding plaintiff was not estopped from relitigating class certification because, after class certification was denied in original case, the complaint was voluntarily dismissed without prejudice pursuant to Fed. R. Civ. P. 41).

had 30 days to appeal the judgment under the Federal Rules of Appellate Procedure. Fed. R. App. P. 4(a)(1)(A). Neither the class representative, class counsel, nor any class member sought to appeal the judgment, rendering it final on September 25, 2008 – five days before Mr. Smith and Ms. Sperlazza filed their motion for certification of an identical economic loss class in the West Virginia state court. Given the binding effect of this Court's final adjudication in *McCollins*, Mr. Smith and Ms. Sperlazza should not now be permitted to collaterally attack the judgment by seeking the same relief in another jurisdiction. *See Gribben v. Kirk*, 195 W. Va. 488, 498, 466 S.E.2d 147, 157 (W. Va. 1995) (holding that "[t]he State's failure to appeal [a prior adverse] judgment collaterally estops it from relitigating the . . . issue in this case") (internal citations omitted).[11]

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[11] Decisions denying injunctive relief for relitigation of class actions are distinguishable on their facts. *See, e.g., In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233 (11th Cir. 2006) (reversing district court's injunction where no final judgment had been entered; in addition, class representatives had been adjudicated inadequate and injunctive relief was not sought until after class had been certified in state court); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998) (affirming denial of injunction where, *inter alia*, federal court order denying certification of a settlement class and disputed state court class settlement had become final); *J.R. Clearwater Inc. v. Ashland Chemical Co.*, 93 F.3d 176 (5th Cir. 1996) (affirming denial of injunction where, at the time the motion was made, the federal order denying class certification was not final). Although some of these decisions contain dicta in tension with the reasoning of *Bridgestone*, this Circuit has held that relitigation of class certification decisions can be enjoined. *See Canady*, 282 F.3d 1005; *Piper Aircraft*, 551 F.2d at 220-21.

III. A PERMANENT INJUNCTION IS THE APPROPRIATE REMEDY.

Plaintiffs Smith and Sperlazza are hoping that a state court will override this Court's decision denying certification of a West Virginia economic loss class of Baycol purchasers. Although the issuance of a permanent injunction involves a balancing of equitable considerations, these factors strongly support relief where, as here, the action that plaintiffs seek to litigate is precluded by an earlier judgment. *See, e.g., Canady*, 282 F.3d at 1020; *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1107-08 (9th Cir. 2003). To obtain a permanent injunction, Bayer first must show that it will succeed on the merits of its claim by establishing that the *Smith* action in West Virginia is precluded. *In re SDDS, Inc.*, 97 F.3d 1030, 1041 (8th Cir. 1996) (holding that, where there has been a prior judgment, "success on the merits of the underlying issue is . . . already secured"); *Time Warner Cable, Inc. v. City of Minneapolis*, No. 06-0484, 2006 WL 1579941, at *7 (D. Minn. June 2, 2006) (same). In addition, the Court should consider: (1) the threat of irreparable harm to the moving party; (2) the balance of harms between granting the injunction and the injury that this might inflict on other interested parties; and (3) the public interest associated with issuing of the injunction. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). Each of these requirements is satisfied here.

First, Bayer has established that Mr. Smith and Ms. Sperlazza's attempt to certify a state-wide class of West Virginia Baycol purchasers in the courts of West Virginia is collaterally estopped by virtue of this Court's judgment in *McCollins*. *See supra*, Argument,

Section II. This establishes actual success on the merits for purposes of issuing permanent injunctive relief pursuant to the All Writs Act. *See In re SDDS, Inc.*, 97 F.3d at 1040-41.

Second, Bayer will suffer irreparable harm if forced to relitigate in West Virginia state court the same issues that were litigated to final resolution in *McCollins. Innovative Med. Sys.*, 2007 WL 3121033, at * 4 (holding that "'a party suffers irreparable harm when it is required to relitigate . . . issues previously decided in a federal court") (quoting *Canady*, 282 F.3d at 1020); *accord Daewoo Elecs. Corp. of Am. v. W. Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir. 1992). Not only has the nationwide Baycol litigation been going on for seven years, Mr. Smith and Ms. Sperlazza waited an equal length of time before moving for certification in the West Virginia state court. Bayer should not be required to again fight battles it already has won. "It is manifestly unfair to subject [a defendant] to a revolving door of endless litigation." *Alvarez*, 143 Cal. App. 4th at 1240.

Third, the balance of equities weighs heavily in favor of the injunction. Foreclosing Mr. Smith and Ms. Sperlazza from relitigating their desire for a state-wide class of Baycol purchasers in the courts of West Virginia does not impose any legitimate harms that should be balanced. "[T]he deprivation of an opportunity to pursue the same issues in a state forum does not constitute a legitimate harm requiring a balancing of the equities." *Canady*, 282 F.3d at 1020; *see also In re SDSS*, 97 F.3d at 1041 ("the rules of equity do not require that [plaintiffs] be given a second bite at the apple in the state forum to obtain a more favorable result"). Because the propriety of a West

Virginia class of Baycol purchasers already has been fully and fairly litigated before this Court, the inability of Mr. Smith and Ms. Sperlazza to relitigate those claims in West Virginia does not present any legitimate harm that weighs against granting the injunction.

Fourth, Bayer's requested injunction is in the public interest. Indeed, where matters have already been litigated to fruition, an injunction against relitigation of those issues "will promote judicial economy and protection of parties from harassing, duplicative litigation, interests which the federal and state courts share." *In re SDSS*, 97 F.3d at 1041 (quoting *Daewoo*, 975 F.2d at 479). Upon this Court's issuance of the requested injunction here, each of these public interests would immediately be advanced.

CONCLUSION

For the foregoing reasons, Bayer respectfully requests that this Court issue an Order pursuant to Federal Rule of Civil Procedure 65 and its statutory authority under 28 U.S.C. §§ 1651 and 2283 permanently enjoining Keith Smith and Shirley Sperlazza from seeking certification of an economic loss class of West Virginia Baycol purchasers in the lawsuit styled *Keith Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (Cir. Ct. Brooke Co., W. Va.).

Dated: October 31, 2008

Respectfully Submitted,

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Exhibit B

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Civil Action No.: _____

[Dated August 24, 2001]

Michael Eugene Black, Peggy Ann Mays, and George F. McCollins, individually, and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
Bayer Corporation, a foreign corporation, authorized to do business in West Virginia as Bayer Corporation, and also known as Bayer AG and Bayer Pharmaceutical.	)
Defendant.	)

CLASS ACTION COMPLAINT

Now come the Plaintiffs, individually and on behalf of all others similarly situated (hereinafter "Class"), by and through counsel, Bell & Bands, PLLC, and for their' Class Action Complaint against Bayer Corporation, also doing business as Bayer AG and Bayer Pharmaceuticals, (hereinafter collectively referred to as "Defendant"), do hereby allege as follows:

INTRODUCTION

1. The instant action is a class action brought by the Plaintiffs on behalf of themselves and members of the Class who have taken Baycol as a cholesterol lowering product, which is manufactured by Defendant. As a result of taking Baycol, the Plaintiffs have been placed at an increased risk of developing health problems, as set forth below.

BACKGROUND OF BAYCOL

2. On August 8, 2001, the United States Food and Drug Administration (FDA) announced that Bayer Pharmaceutical Division was voluntarily withdrawing Baycol (cerivastatin) from the U.S. market because of reports of sometimes fatal rhabdomyolysis, a severe muscle adverse reaction from this cholesterol-lowering (lipid-lowering) product. The FDA agreed with and supported the decision.

3. Baycol (cerivastatin), which was initially approved in the U.S. in 1997, is a member of a class of cholesterol lowering drugs that are commonly referred to as "statins." Statins lower cholesterol levels by blocking a specific enzyme in the body that is involved in the synthesis of cholesterol. While all statins have been associated with very rare reports of rhabdomyolysis, cases of fatal rhabdomyolysis in association with the use of Baycol have been reported significantly

more frequently than for other approved statins.

4. Fatal rhabdomyolysis reports with Baycol have been reported most frequently when used at higher doses, when used in elderly patients, and particularly, when used in combination with gemfibrozil (LOPID and generics), another lipid lowering drug. FDA has received reports of 31 U.S. deaths due to severe rhabdomyolysis associated with use of Baycol, 12 of which involved concomitant gemfibrozil use.

5. Rhabdomyolysis is a condition that results in muscle cell breakdown and release of the contents of muscle cells into the bloodstream. Symptoms of rhabdomyolysis include muscle pain, weakness, tenderness, malaise, fever, dark urine, nausea, and vomiting. The pain may involve specific groups of muscles or may be generalized throughout the body. Most frequently, the involved muscle groups are the calves and lower back; however, some patients report no symptoms of muscle injury. In some cases, the muscle injury is so severe that patients develop renal failure and other organ failure, which can be fatal.

6. Some of the signs and tests for diagnosing rhabdomyolysis include, but are not limited to:

   a. urinalysis

b. urine myoglobin

c. serum myoglobin

d. CPK

e. serum potassium.

JURISDICTION AND VENUE

7. The parties to this action and the acts and omissions complained herein are subject to the jurisdiction of this Court.

8. Venue properly lies before this Court pursuant to W. Va. Code § 56-1-1(a)(1), providing in part that a civil action may be brought in the circuit court of any county where the cause of action arose. See also Syl. pt. 2, Banner Printing Co. v. Bykota Corp., 182 W. Va. 488, 388 S.E.2d 844 (1989) (venue of an action against a corporate defendant lies in the county where the cause of action arises).

9. The named Plaintiffs seek recovery by way of creation of a court administered trust and/or other remedy which will permit the Plaintiffs to receive appropriate medical testing, screening, diagnosis and monitoring as a result of taking Baycol, as discussed further herein. See Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 522 S.E.2d 424 (1999).

10. Plaintiffs' claims and the claim of each Class member is less than $75,000.00 and therefore federal jurisdiction does not exist in this case.

PARTIES

11. Plaintiff Michael Eugene Black was at the time of this cause of action a citizen and resident of Cabell County, West Virginia.

12. Plaintiff Peggy Ann Mays was at the time of this cause of action a citizen and resident of Cabell County, West Virginia.

13. Plaintiff George F. McCollins was at the time of this cause of action a citizen and resident of Cabell County, West Virginia.

14. Defendant is a foreign corporation authorized to do business in West Virginia with its principal business office located at 100 Bayer Road, Pittsburgh, Pennsylvania.

15. At all times material and relevant hereto, the acts of omission and commission which caused the injuries to the Plaintiffs as set forth below, were done by the Defendant, its agents, servants and/or employees, acting in the course and scope of their employment, within and under the direct and exclusive control of the Defendant.

16. At all times relevant hereto, the property, equipment, materials, substances and operations involved in the injuries sustained

by the Plaintiffs were owned and/or operated under the direct and exclusive control of Defendant, its agents, servants and/or employees.

COUNT ONE
AS TO THE PLAINTIFFS

17. Upon information and belief, the Plaintiffs restate and reallege the facts and allegations as set forth in paragraphs 1 through 16 above as if fully set forth herein.

18. Due to the nature and circumstances of Defendant's manufacturing and marketing of Baycol, Defendant explicitly and implicitly undertook a duty to exercise reasonable care to avoid harm to Plaintiffs' physical and mental well-being.

19. Defendant failed to adequately protect, warn, and disclose to Plaintiffs, physicians, and other health care professionals when it was reasonably known or should have been known that the Plaintiffs were being placed at an increased risk of health problems by taking Baycol.

20. Despite Defendant's knowledge or notice regarding the serious health hazards associated with Baycol, Defendant decided to manufacture, market, and place Baycol in the stream of commerce for use by Plaintiffs.

21. Despite Defendant's knowledge or notice regarding the serious health hazards of

Baycol, the Defendant failed to take reasonable steps to investigate the extent and nature of the hazards of the Baycol to which the Plaintiffs were being placed at risk.

22. By waiting to disclose to the Plaintiffs about the dangers of Baycol, Plaintiffs have been deprived of the value and benefits of early diagnosis and treatment.

COUNT TWO
AS TO COMMON QUESTIONS

23. Upon information and belief, the Plaintiffs restate and reallege the facts and allegations as set forth in paragraphs 1 through 22 above as if fully set forth herein.

24. There are multiple common questions of law and fact applicable to the Plaintiffs and members of the Class, including, without limitation:

a. The health problems associated with Baycol;

b. Defendant's knowledge or notice regarding the hazards of Baycol usage;

c. Defendant's failure to provide adequate warnings or information regarding Baycol usage; and

d. The nature of relief by way of medical monitoring which the Plaintiffs and

members of the Class reasonably require as a result of the Defendant's negligent conduct.

COUNT THREE
AS TO CLASS

25. This civil action is brought by the Plaintiffs as a class action, individually and on behalf of all others similarly situated under the provisions of Rule 23 of the West Virginia Rules of Civil Procedure (hereinafter "W.V.R.C.P.")

26. The Class consists of all individuals who have at any time taken Baycol in West Virginia from when Baycol was initially placed on the market in the United States until the present.

27. Although Plaintiffs are unaware of the exact number of the Class, according to the FDA, it is believed that over 700,000 Americans have taken Baycol. Therefore, Plaintiffs allege that the Class is made up of at least, and in all probability in excess of 500 persons and is thus so numerous that joinder of individual members is impracticable.

28. There are common questions of law and fact in this action that relate to and affect the rights of each member and the relief sought is common to the entire Class. The common questions of law and fact include the Plaintiffs' right of recovery arising out of

Defendant's negligent acts and omissions in manufacturing, marketing, and placing Baycol in the stream of commerce for individuals to take.

29. The claims and defenses of the Plaintiffs are typical of the claims and defenses of the Class.

30. The Plaintiffs will fairly and adequately represent and protect the interests of the Class.

31. Pursuant to W.V.R.C.P. Rule 23, this action is properly maintained as a class action in that the prosecution of several actions by individual members of the Class would create the risk of varying adjudications with respect to members of the Class, as well as create inconsistent standards of conduct for those opposing the Class. Further, individual actions by members of the Class may be dispositive of the interests of other members not parties to the adjudication of the claim which would impair or impede the ability of those individuals to protect their interests.

CAUSE OF ACTION: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

32. Upon information and belief, the Plaintiffs restate and reallege the facts and allegations as set forth in paragraphs 1 through 31 above as if fully set forth herein.

33. Plaintiffs' increased risk to illness is the direct and proximate result of Defendant's negligent breach of duty to exercise reasonable care and protect Plaintiffs from the health hazards associated with taking Baycol.

34. Plaintiffs' increased risk to illness is the direct and proximate result of Defendant's negligent breach of duty to exercise reasonable care and disclose to and adequately warn the Plaintiffs of the known or reasonably discoverable dangers of Baycol.

35. As the direct and proximate result of learning of the risks of taking Baycol, Plaintiffs have suffered serious emotional distress and anguish based on Plaintiffs' reasonable fear of side effects and developing illnesses. As consequences of their emotional distress and anguish, Plaintiffs have experienced various mental conditions including, but not limited to, anxiety, fear, fright, anger, chagrin, disappointment, worry, and nausea.

36. By reason of the negligent conduct of the Defendant as herein above described, the Plaintiffs have been damaged in their person, and have suffered and will suffer foreseeable losses and damages, in that their taking Baycol has placed them in a position where they require medical testing and diagnosis to determine the existence and extent of latent physical disorders, the

detection which can lead to improved treatment, materially improved health outcomes, and greater understanding and appreciation of their health status, as well as permit detection of the future development of physical injuries which taking Baycol has materially increased the risk of developing.

37. The increased risk of the Plaintiffs makes periodic diagnostic medical examination reasonably necessary.

38. Monitoring and testing procedures exist which make early detection and treatment of the disease processes described above possible and beneficial.

39. The increased risk and susceptibility to injuries, illness and disease of the Plaintiffs can only be mitigated through the creation of medical monitoring fund to provide for a medical monitoring program, including notification of Class members of the risks of harm described herein, funding a Court supervised program for diagnostic evaluation and testing to be made available to the Plaintiffs, funding further study into full long term effects of Baycol usage; funding future research into appropriate protocols for individuals who have taken Baycol.

40. Plaintiffs do not have an adequate remedy at law in the absence of the instant medical monitoring fund, as the allowance of

monetary damages alone following the detection and diagnosis of advance illness or disease as may be caused by Baycol is likely to then be permanent, irreversible, and highly progressed, at which time Plaintiffs' health will be permanently and severely affected, whereas the relief sought herein will permit the early detection and intervention relative to any disease processes before greater harm can occur, at a time when the effects are less pronounced, more likely reversible and/or subject to more successful treatment. As such, the Court supervised medical monitoring program can be reasonably calculated to provide for the allowance of prompt medical diagnosis to increase the Plaintiffs' opportunities to lead a productive life, avoid or recover from illness or disease, and to minimize disability.

WHEREFORE, Plaintiffs pray for themselves and all Class members similarly situated judgment against Defendant as follows:

1. Compensatory damages for past, present, and future medical monitoring and other medical expenses in the form of a Court supervised medical monitoring fund or other appropriate fund for medical monitoring as this Court may find appropriate.

2. Compensatory damages for past, present, and future emotional distress and anguish.

3. Attorneys' fees, litigation expenses, and costs.

4. Such other relief as this Court may deem proper.

THE PLAINTIFFS DEMAND A TRIAL BY JURY

Michael Eugene Black,
Peggy Ann Mays, and
George F. McCollins,
individually, and on
behalf of all others
similarly situated.
By Counsel

Harry F. Bell, Jr. (WV Bar No. 297)
William L. Bands (VW Bar No. 6048)
Ftemkos (Tim) J. Yianne (WV Bar No. 8623)
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EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
Case No: 02-CV-199

[Filed March 17, 2003]

In Re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
MICHAEL EUGENE BLACK and GEORGE F. MCCOLLINS, individually, and on behalf of all others similarly situated,	)))
	)
Plaintiffs,	)
	)
v.	)
	)
BAYER CORPORATION, a foreign corporation authorized to do business in West Virginia, BAYER AG, a foreign corporation, and SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE; and GLAXOSMITHKLINE plc, a foreign corporation,	))))))))
	)
Defendants.	)
	)

PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT

Now come the Plaintiffs, individually and on behalf of all others similarly situated (hereinafter "Class"), by and through counsel, Bell & Bands, PLLC, and hereby amend the First Amended Class Action Complaint. In this Second Amended Class Action Complaint, the Plaintiffs do hereby allege as follows:

INTRODUCTION

1. The instant action is a class action brought by the Plaintiffs on behalf of themselves and members of the Class who have purchased Baycol as a cholesterol lowering product in West Virginia.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this Action pursuant to 28 U.S.C. Section 1332.

3. Venue is appropriate under 28 U.S.C. Sections 1391(b) and (d).

PARTIES

4. Plaintiff Michael Eugene Black was at the time of this cause of action a citizen and resident of Cabell County, West Virginia.

5. Plaintiff George F. McCollins was at the time of this cause of action a citizen and resident of Cabell County, West Virginia.

6. Defendant, Bayer AG, is a foreign corporation with its principal place of business in Leverkusen, Germany. One of Bayer AG's

businesses is the manufacture, marketing, and sales of pharmaceuticals, along with the attendant research and development. Bayer AG manufactured Baycol, and marketed and distributed it worldwide.

7. Defendant Bayer Corporation is a wholly owned subsidiary of Bayer AG. It has its principal place of business at 100 Bayer Road, Pittsburgh, PA 15205, and is incorporated under the laws of Pennsylvania. At all times relevant hereto, Bayer Corporation was engaged in the business of marketing and distributing Baycol in the United States. Bayer Corporation's Baycol was manufactured by Bayer AG.

8. Defendant SmithKline Beecham Corporation is a Pennsylvania corporation, with its principal place of business located at One Franklin Plaza, Philadelphia, Pennsylvania. SmithKline Beecham Corporation is now wholly owned subsidiary of Defendant GlaxoSmithKline plc and conducts pharmaceutical research and development in the United States under the fictitious corporate name GlaxoSmithKline.

9. Defendant GlaxoSmithKline plc is a British corporation and has its principal place of business at Berkeley Avenue, Greenford, Middlsex, England. GlaxoSmithKline plc has its principal place of business in the United States at its headquarters at One Franklin Plaza, Philadelphia, Pennsylvania. In December 2000, GlaxoSmithKline plc acquired Glaxo Welcome and SmithKline Beecham. At all times relevant from December 2000, forward, GlaxoSmithKline

plc was the holding company of SmithKline Beecham Corporation d/b/a GlaxoSmithKline, which was engaged in the business of marketing and distributing the pharmaceutical Baycol in the United States in partnership with Bayer Corporation.

10. Baycol was developed and manufactured by Bayer AG, and sold, distributed, and marketed in the United States by Bayer Corporation together with SmithKline Beecham Corporation d/b/a GlaxoSmithKline, and its predecessors.

11. In or around July, 1997, GlaxoSmithKline plc's predecessor SmithKline Beecham Corporation entered into an agreement with Bayer to promote, market, and distribute Baycol. At all times relevant, GlaxoSmithKline plc and SmithKline Beecham Corporation conducted its marketing business from SmithKline Beecham Corporation's headquarters in Philadelphia, Pennsylvania.

12. There exists, and at all relevant times mentioned there existed, a unity of interest in ownership between SmithKline Beecham Corporation d/b/a GlaxoSmithKline and GlaxoSmithKline plc such that any individuality and separateness between them has ceased and these Defendants are the alter-egos of one another and exerted control over each other. Adherence to the fiction of the separate existence of these certain Defendants as entities distinct from another will permit an abuse of the corporate privilege, would sanction fraud and promote injustice.

13. At all times relevant, Defendants, themselves, or by use of others, did manufacture, create, design, test, label, sterilize, package, distribute, supply, market, sell, advertise, warn, and otherwise distribute in interstate commerce, the product Baycol.

FACTUAL BACKGROUND

14. Baycol is one of a class of drugs called statins that work to inhibit an enzyme in the liver which generates the kind of cholesterol that can clog blood vessels. Statins are commonly prescribed for high blood pressure and heart disease.

15. The cholesterol-lowering drug market is enormous, and Defendants viewed Baycol as a blockbuster product with significant projected growth potential.

16. Defendants introduced Baycol in the United States in 1997 after gaining the approval of the United States Food and Drug Administration ("FDA"), and marketed it as a safe and effective statin. Baycol was a relatively late entrant into the statin market, and was no more effective at the recommended does than its competitors. Because it had no efficacy advantage, Bayer pushed for FDA approval of higher dosages of the drug, despite clinical indications that adverse effects were significantly linked to higher does in clinical trials.

17. Muscle weakness and rhabdomyolysis are side effects, to varying extents, of all statins.

Rhabdomyolysis is a very serious condition in which skeletal muscle tissue is broken down, releasing muscle enzymes and electrolytes from inside the muscle cells which can cause muscle breakdown, kidney failure and death. The association with rhabdomyolysis is approximately ten times stronger in Baycol than in other statins, but Defendants, and each of them, never adequately warned the FDA, doctors, or consumers of the true risks of the drug.

18. Baycol and gemfibrozil were often jointly administered because Baycol can lower total cholesterol while gemfibrozil can improve the important balance of triglycerides and HDL, or "good," cholesterol. The dual prescription was particularly common for patients with diabetes.

19. The first death from rhabdomyolysis among Baycol patients was in 1998, within a year of the drug's launch. Since that time, thirty-one additional deaths in this country have been associated with the drug. Bayer has confirmed that over 1,000 cases of muscle weakness and/or damage have been reported in association with the drug. It is believed that far more instances of serious side effects caused by Baycol have occurred but have not yet been properly diagnosed, or associated with taking Baycol. By the end of October, 2000, doctors had reported 482 cases of rhabdomyolysis among Baycol users worldwide. In about half of these cases, doctors had co-prescribed Baycol and gemfibrozil.

20. The long-term consequences of rhabdomyolysis can include muscle tissue degeneration, damage to the kidneys, liver lesions, and damage to other major organs. All of these effects can occur without any marked outward symptoms, or without any symptoms that would be recognized as associated with Baycol or with rhabdomyolysis by a doctor not specifically looking for that connection.

21. In January, 1999, the FDA required certain changes in Baycol labeling. In the Warnings section, under Skeletal Muscle, the text was revised to read, "Rare cases of rhabdomyolysis (some with acute renal failure secondary to myoglobinuria) have been reported with cerivastatin and other drugs in this class." And under adverse reactions, the following language was added, "The following events have been reported since market introduction. While these events were temporarily associated with the use of Baycol, a causal relationship to the use of Baycol cannot be readily determined due to the spontaneous nature of reporting of medical events, and the lack of controls: hepatitis, myositis, rhabdomyolysis, some with associated renal failure (most cases involved concomitant gemfibrozil), urticaria, angioedema, visual disturbance, blurred vision."

22. In the face of mounting evidence from post-marketing experience, and given data from clinical trials, Bayer knew or should have known that a significant portion of the adverse effects experienced were causally related to Baycol use. Studies measuring the levels of

certain enzymes that indicate the destruction of muscle and liver cells showed significant increases in those enzyme levels even in healthy young test subjects who had taken Baycol. The studies showed that higher dosages of Baycol led to even higher enzyme levels in a greater number of test subjects.

23. Despite those clinical trials and the experience of patients, Bayer persisted in seeking approval of higher dosages. In May, 1999, four months after requiring the labeling change, the FDA granted approval to market a .4 mg dose, double the previous highest dose. Unsatisfied, Bayer pushed to get approval on a .8 mg dose.

24. The further testing required for the new dose should have signaled significant problems with the .4 mg does, and an even higher rate of adverse events for groups taking a .8 mg does of Baycol. Significant numbers of test subjects dropped out of these tests with rhabdomyolysis-related symptoms. Of the remaining subjects, incidence of enzyme levels indicated significant muscle and liver damage in a high percentage of patients. Nevertheless, Bayer moved ahead with its plans, and received approval to market the .8 mg does in July, 2000.

25. In late 2000, the German health ministry became sufficiently concerned with reported adverse effects that it put the drug on a watch list.

26. In April, 2000, the FDA again mandated stronger label warnings, emphasizing

particularly the risks of prescribing gemfibrozil in conjunction with Baycol. On May 21, 2001, Bayer sent doctors a "Dear Doctor" letter which belatedly called attention to some of the dangers associated with Baycol use, particularly when combined with gemfibrozil. Nonetheless, Bayer continued to misrepresent and conceal the dangers associated with Baycol. Still the company insisted, "When used as directed, Baycol effectively and safely treats patients with [high cholesterol levels]."

27. These warnings were ineffective both because they were simply insufficient to prevent co-prescription of Baycol and gemfibrozil, and because Baycol was associated with a significant number of adverse events en if prescribed alone. Indeed, most of the deaths in the United States occurred in patients who were not taking gemfibrozil.

29. Despite its knowledge of the ineffectiveness of its warnings, and of the dose-dependent and inherent dangers of Baycol use, Bayer continued to conceal the adverse effects associated with Baycol use and to market the drug throughout the United States and abroad. Bayer marketed both the .4 mg and the .8 mg doses to doctors as safe and highly effective. There was no balance in the advertisements between the statements of efficacy, large and prominent, and the statements of risk and danger, embedded in lengthy fine print statements, misleading in their presentation.

29. On August 8, 2001, Bayer announced that it was removing Baycol from the market for public safety reasons. At the same time, it issued a letter to doctors, now stating that "Rhabdomyolysis is a serious, potentially fatal, adverse effect of all statin drugs, including Baycol. It can occur with statin monotherapy, though the risk appears to be increased significantly by concomitant use of gemfibrozil (Lopid)."

30. In July, the European Medicines Evaluation Agency announced that it was investigating the side effects of Baycol.

31. The German health ministry has accused Bayer AG of grave errors in its information policy regarding the side-effects of Baycol. The company is reported to have withheld new information on the side-effects from the German institute for drugs and medical products for almost two months and only made the information available on demand. Under German drug law, new information over serious side-effects must be reported within fifteen days. Nonetheless, Bayer continued to misrepresent and conceal the dangers associated with Baycol. Still the company insisted, "When used as directed, Baycol effectively and safely treats patients with [high cholesterol levels]."

32. Worldwide, six million patients have been treated with Baycol. At the time of withdrawal, some 700,000 patients were estimated to be taking the drug in the United States. Last year,

Bayer's Baycol sales exceeded $550 million. This year Bayer had predicted significant growth in sales.

CLASS ACTION ALLEGATIONS

33. Plaintiffs bring this class action pursuant to Federal Rules of Civil Procedure 23(a)(1)-(4), 23(b)(2) and 23(b)(3) on behalf of a Class consisting of all persons in West Virginia, as set forth below in paragraph 30, who have purchased and suffered injury as a result of purchasing Baycol, which was designed, manufactured, supplied, distributed, sold and or placed in the stream of interstate commerce by Defendants.

34. The Class consists of:

> All persons in West Virginia who purchased the drug cerivastatin under the brand name "Baycol" between February 1998 and August 8, 2001, or their estates, administrators or other legal representatives, heirs or beneficiaries. Excluded from the class and any subclasses are Defendants, the officers and directors of the Defendants at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest. In addition, Plaintiffs expressly disclaim any intent to seek any recovery for

personal injuries suffered or which may be suffered by any class member.

35. Plaintiffs are a member of the Class they seek to represent. The members of the Class are so numerous that joinder is impracticable and would involve thousands of litigants.

36. There are questions of law and fact common to the Class including, but not limited to:

a. Whether Defendants designed, manufactured and/or marketed a dangerously defective product;

b. Whether use of Baycol causes injury;

c. Whether Defendants acted negligently in promoting and selling Baycol;

d. Whether Defendants conducted, either directly or indirectly, appropriate testing of Baycol and Baycol's interactions with other drugs;

e. Whether Defendants failed to adequately warn of the adverse effects of Baycol as compared to other forms of reducing cholesterol;

f. Whether Defendants falsely and fraudulently misrepresented in their advertisements, promotional materials and other materials, among other things, the safety and side effects of Baycol and

concealed the dangers associated with Baycol;

g. Whether Defendants failed to ensure that their drugs would only be prescribed to persons who were not using other drugs with dangerous cross interdictions with contemporaneous use of Baycol; and

h. Whether Defendants are liable for punitive damages.

37. The claims of the named Plaintiffs are typical of the claims of the Class in that the named Plaintiffs and the members of the Class purchased Baycol, which was designed, manufactured, supplied, distributed, sold, and/or placed in the stream of interstate commerce by Defendants, and did suffer or may suffer harm as a result of such purchase.

38. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class. Plaintiffs have retained counsel competent and experienced in complex class actions.

39. Class certification is appropriate under Fed. R. Civ. P. Rule 23(b)(3) because common issues of law and fact relative to the design, manufacture and marketing of Baycol predominate over individual issues. A class action is superior to other available methods for the fair and efficient adjudication of this litigation since individual joinder of all members of the Class is impracticable.

40. Class certification is also appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants have acted on ground generally applicable to the Class, making appropriate equitable injunctive relief with respect to Plaintiffs and the Class members.

FIRST CLAIM FOR RELIEF
BREACH OF EXPRESS WARRANTY

41. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege as follows:

42. Defendants expressly warranted that Baycol was safe and well tolerated by patients studied.

43. Baycol did not conform to these express representations because Baycol is not safe and has high levels of serous side effects, including life threatening side effects.

44. As a direct and proximate result of the breach of said warranties, Plaintiffs suffered and will continue to suffer injury, harm and economic loss as alleged herein.

SECOND CLAIM FOR RELIEF
BREACH OF IMPLIED WARRANTY

45. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege as follows:

46. At the time Defendants marketed, sold, and distributed Baycol for purchase and use by

Plaintiffs, Defendants knew of the use for which Baycol was intended and impliedly warranted the product to be of merchantable quality and safe and fit for such use.

47. Plaintiffs and their physicians reasonably relied upon the skill and judgment of Defendants as to whether Baycol and its use in combination with gemfibrozil was of merchantable quality and safe and fit for its intended use.

48. Contrary to such implied warranty, Baycol and it use in combination with gemfibrozil were not of merchantable quality or safe or fit for its intended use, because the products were and are unreasonably dangerous and unfit for the ordinary purposes for which it was used as described above.

49. As a direct and proximate result of the breach of implied warranty, Plaintiffs suffered and will continue to suffer injury, harm and economic loss as alleged herein.

THIRD CLAIM FOR RELIEF
UNJUST ENRICHMENT

50. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege as follows:

51. As a direct, proximate, and foreseeable result of Defendants' acts, Plaintiffs and each Class member have been gravely harmed. Defendants profited and benefited from the sale of Baycol, even as it injured Plaintiffs.

52. Defendants have voluntarily accepted and retained these profits and benefits, derived from Plaintiffs and Class members, with full knowledge and awareness that, as a result of Defendants' unconscionable and intentional wrongdoing, Plaintiffs and Class members were not receiving products of the quality, nature, fitness, or value that has been represented by Defendants or that Plaintiffs, as reasonable consumers, expected. Plaintiffs and Class members purchased medicine that they expected would improve their health, and instead found their health quite definitely adversely effected.

53. By virtue of the conscious wrongdoing alleged in this Complaint, Defendants have been unjustly enriched at the expense of the Plaintiffs and Class members, who are entitled in equity, and hereby seek, the disgorgement and restitution of Defendants' wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed appropriate by the Court; and such other relief as the Court deems just and proper to remedy Defendants' unjust enrichment.

FOURTH CLAIM FOR RELIEF
UNLAWFUL ACTS OR PRACTICES

54. Plaintiffs incorporate by reference to all preceding paragraphs as if fully set forth here and further alleges as follows:

55. Defendants violated West Virginia Code § 46A-6-101, *et seq.*, which pertains to unfair methods of competition and unfair or deceptive acts or

practices, in that Plaintiffs and members of the Class purchased and used Baycol, and thereby suffered ascertainable loss as a result of Defendants' actions in violation of the Act, as set forth below.

56. Unfair methods of competition and unfair or deceptive acts or practices are defined and declared unlawful in W.Va. Code § 46A-6-101, *et seq.*:

> § 46A-6-104. Unlawful acts or practices. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

57. In violation of these statutes, Defendants made untrue, deceptive or misleading representations of material facts to, and omitted and/or concealed material facts from, Plaintiffs and members of the Class in product packaging, labeling, medical advertising, direct consumer advertising, promotional campaigns and materials, among other ways, regarding the safety and use of Baycol. Moreover, Defendants downplayed and/or understated the serious nature of the risks associated with Baycol in order to increase sales. Defendants also represented that Baycol was of a particular standard and quality, when Defendants knew or should have reasonably known it was not.

58. The misrepresentations and omissions described herein were likely to deceive

consumers into purchasing and ingesting Baycol.

59. Defendants knew or should have known that the use of Baycol could cause serious and potentially life threatening medical conditions.

60. Defendants knew of the growing public acceptance of the misinformation and misrepresentations regarding the safety and efficacy of Baycol, but remained silent until August 8, 2001, because their appetite for significant future profits far outweighed their concern for the health and safety of Plaintiffs and members of the Class.

61. Defendants concealed, omitted, or minimized the side effects of Baycol, or provided misinformation about adverse reactions and potential harms from Baycol, and succeeded in persuading consumers to purchase and ingest Baycol, despite the lack of safety and the risk of adverse medical reactions, including renal failure and other organ failure.

62. Defendants had a post manufacture duty to warn, which arose when they knew, or with reasonable care should have know, that Baycol was injurious and sometimes fatal.

63. Defendants intended that others would rely upon the concealment, suppression or omission of the risks of ingesting Baycol, when consumers purchased and ingested the product.

64. Defendants' actions in connection with the manufacturing, distributing, and marketing of Baycol as set forth herein evidence a lack of good faith, honesty in fact and observance of fair dealing so as to constitute unconscionable commercial practices, in violation of the West Virginia unfair trade practices laws.

65. As a proximate result of the acts of unfair and deceptive trade practices and/or consumer fraud set forth above, Plaintiffs and the Class have purchased unsafe products.

66. Defendants acted willfully, knowingly, intentionally, unconscionably and with reckless indifference when it committed these acts of unfair and deceptive trade practices and/or consumer fraud.

67. As a result of the acts of these unfair and deceptive trade practices and/or consumer fraud described above, Plaintiffs and the Class have suffered ascertainable loss - economic loss that includes the purchase price of the products - for which Defendants are liable to Plaintiffs and the Class for their ascertainable losses.

WHEREFORE, Plaintiffs pray for themselves and all Class members similarly situated judgment against Defendants as follows:

1. That this action be certified as a class action on behalf of the proposed Plaintiff Class and that Plaintiffs be designated as representatives of the Class;

2. For general damages in a sum in excess of the Jurisdictional minimum of this Court;

3. Prejudgment and post-judgment interest as provided by law;

4. Full refund of all purchase costs Plaintiffs and the members of the Plaintiff Class for Baycol;

5. Compensatory damages in excess of the jurisdictional minimum of the Court, according to the proof;

6. Consequential damages in excess of the jurisdictional minimum of the Court, according to the proof;

7. Punitive and exemplary damages;

8. Attorneys' fees, expenses, and costs of this Action; and

9. Such further relief as this Court deems necessary, just, and proper.

THE PLAINTIFFS DEMAND A TRIAL BY JURY

Michael Eugene Black,
and George F. McCollins,
individually, and on behalf of
all others similarly situated,
By Counsel,

/s/
Harry F. Bell, Jr.

William L. Bands
Ftemkos (Tim) J. Yianne
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Exhibit E

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-_____

[Dated September 21, 2001]

KEITH SMITH, SHIRLEY SPERLAZZA, and NANCY GANDEE

Plaintiff,

v.

BAYER CORPORATION, a division of Bayer AG,; WEST VIRGINIA UNIVERSITY MEDICAL CORPORATION, a West Virginia corporation; and PATRICK KNOST, M. D., an individual,

Defendants.

COMPLAINT

1. This Court has venue and jurisdiction over this action.

2. This Court has subject matter jurisdiction over the claims set forth in this Complaint as the claims do not arise out of federal law. The plaintiffs and the class they seek to represent (hereinafter referred to collectively as "plaintiffs") seek no relief under any federal laws or regulations, assert no federal claims,

and withdraw any asserted state claim that is preempted by federal law. The claims herein are brought solely under state common and state statutory law. Any and all claims or possible claims under any federal law, code, regulation, rule, and/or otherwise are expressly not brought herein and disclaimed. The United States District Court does not have diversity jurisdiction over this case as complete diversity of citizenship is lacking.

3. This action is brought for individual claims and pursuant to West Virginia Rules of Civil Procedure 23, as a class action on behalf of the named plaintiffs and on behalf of all West Virginia residents and others who have ingested Cerivastatin, sold under the trade name "Baycol", in West Virginia.

4. This action is brought as a result of any acts or omissions of defendants, their agents, servants, employees, co-conspirators and/or joint venturers or any member of a class of defendants as hereinafter alleged.

5. Defendant Bayer Corporation (hereinafter referred to as Bayer whether acting by and through its agents, servants, employees, co-conspirators, joint venturers and/or subsidiaries), is a corporation with its principal place of business in Connecticut. At all relevant times herein, Bayer was and is in the business of developing, designing, conceiving, formulating, manufacturing, packaging, labeling, marketing, advertising, distributing and selling the drug, Baycol, in the United States, including the State of West Virginia, for consumption and ingestion by citizens and residents of this state, including Brooke County, West Virginia.

6. Defendant West Virginia University Medical Corporation ("UHA) is a West Virginia corporation with its principal place of business in Monongalia County, West Virginia.

7. Each plaintiff is a resident of West Virginia, who purchased and ingested Cerivastatin/Baycol (hereinafter referred to as "drug", which was conceived, designed, developed, formulated, manufactured, packaged, labeled, marketed, advertised, sold and placed in the stream of commerce to persons, firms and corporations for resale to plaintiffs and for direct sale to plaintiffs as hereinafter alleged.

8. Defendant UHA named below, through its agents purchased, prescribed, distributed and/or sold the drug to residents of West Virginia, which said defendant is a representative of a class of health care providers (hereinafter referred to as "health care providers") who purchased, advertised, marketed, prescribed, distributed and/or sold the drug to residents of the State of West Virginia, including the named plaintiff Nancy Gandee.

9. Defendant Patrick Knost, M. D. named below, through its agents purchased, prescribed, distributed and/or sold the drug to residents of West Virginia, which said defendant is a representative of a class of health care providers (hereinafter referred to as "health care providers") who purchased, advertised, marketed, prescribed, distributed and/or sold the drug to residents of the State of West Virginia, including the named plaintiff, Nancy Gandee.

10. At all times complained of herein, defendants were acting for and on their own behalf and as agents, ostensible agents, servants and/or employees, one of the other, in the course and scope of their employment, agency and/or ostensible agency.

11. At all times complained of herein, defendants were acting as conspirators, one of the other, and with unnamed persons, firms and corporations in common goals, schemes and designs for the goals and purposes as herein alleged and complained of.

12. At all times complained of herein, drfendants entered into a joint venture, one with the other, and with unnamed persons, firms and corporations for the goals and purposes as herein alleged and complained of.

13. The "drug" contained toxins and when taken by human beings had a deleterious effect on the health of human beings, including causing rhabdomylysis, myopathy, damaging their kidneys by causing failure of the same, and other related and unrelated damages, both temporary and permanent, and the drug was unreasonably dangerous.

14. The defendants knew or should have known that the drug was dangerous and defective and that their acts and/or omissions would cause injury and damage to persons who ingested them, including your plaintiff and the class that she seeks to represent.

15. Defendant drug manufacturers negligently, carelessly, knowingly, recklessly, wrongfully and intentionally designed, formulated, tested, manufactured, labeled, distributed, advertised,

marketed, prescribed and placed the drug in the stream of commerce for sale in the United States, including the State of West Virginia, and sold the drug to West Virginia residents, including your plaintiffs and the class that they seek to represent.

16. The Health Care Providers negligently, carelessly, knowingly, wrongfully, recklessly and intentionally purchased, offered for sale, advertised, distributed and/or sold the drug to citizens of West Virginia, including plaintiff, Nancy Gandee and the class which she seeks to represent, and violated West Virginia Code, § 55-7B-1, et seq.

17. Defendants, and each of them, acting individually and in concert as alleged above, set about to and did advertise, market and directly and indirectly caused to be ingested by plaintiffs the drug which said use was dangerous, untested and unapproved.

18. Defendant drug manufacturers knew or should have known of the dangers of the drug thereof and owed a duty to provide information to the public, physicians, clinics, pharmacies and others of the dangers of the product and the proper and appropriate warnings which would clearly advise physicians, clinics and the public of the dangers of the use of said drug and the effectiveness of said drug.

19. Defendant drug manufacturers intentionally, knowingly, recklessly and negligently failed and refused to advise clinics, physicians, the public or others of the aforesaid dangers of the product and of the effectiveness of said drug.

20. Defendant drug manufacturers set about to and did encourage and enlist the clinics and physicians and others to assist the drug manufacturers to advertise, market, promote, prescribe and sell the drug to plaintiffs and to mislead plaintiffs and the class to purchase and ingest the drug and, in so doing, said physicians were acting as the drug manufacturers' agents, ostensible agents, servants, employees, conspirators and/or joint venturers.

21. Defendants negligently, knowingly, recklessly and intentionally failed and refused to use due care in conceiving, designing, researching, testing, formulating, packaging, advertising, marketing, selling, prescribing and placing the drug in the stream of commerce.

22. Defendants negligently, knowingly, recklessly and intentionally failed and refused to properly supervise, instruct and inform by warnings, instructions, training and publication the dangers associated with the use of the drug and of the short term and the long term periodic diagnostic medical examinations reasonably necessary for persons who had ingested the drug.

23. Defendants negligently, knowingly, recklessly and intentionally withheld information from the public, physicians, pharmacies, clinics, the medical community, and others who had a right to know, of information which would have prevented the plaintiffs from being exposed to said drug.

24. Defendants negligently, knowingly, recklessly and intentionally encouraged the widespread use of the drug which defendants knew or

should have known would reasonably harm plaintiffs and others similarly situated.

25. Defendants set about intentionally and knowingly, by acts and omissions, in the manner aforesaid to withhold information from the public, physicians and others who had a right to know, including plaintiffs, information which described the true dangers associated with the use of the drug for the sole and exclusive reason that defendants wished to make a profit from the distribution and sale of said drug.

26. Plaintiffs did not have sufficient information to determine the safety of the drug and, therefore, relied upon the superior knowledge of defendants in deciding to purchase the drug, and, as a result of the reliance on defendants' false and misleading affirmative misrepresentations and intentional omissions and hiding of relevant, significant and material facts and information, plaintiffs and others were mislead into believing the drug was safe and effective for use in the manner prescribed and/or taken.

27. Defendant drug manufacturer withheld information which it had in its possession concerning research, testing, lack of research and testing, studies of humans who had taken the drug and of animals who had been given the drug which demonstrated that the drug causes damage to the human muscular system, liver and kidneys which medically, legally, scientifically and ethically plaintiffs had a right to know before ingesting and which defendants had a duty under the law of West Virginia to disclose.

28. Defendant drug manufacturer provided false and misleading information concerning its products in that it provided only partial information concerning ill effects of the drug when it knew or should have known and had a duty to know and inform of other dangers associated with the use of the drug.

29. The defendants' failure to inform plaintiffs and others of all of said information misled plaintiffs and others into believing it was safe and effective to ingest the drug.

30. There have been public notices issued by defendants which direct persons, including plaintiffs, to seek medical care and treatment and to incur medical expenses as a proximate result of the plaintiffs and the class having taken the drug and of the defendants' acts and omissions as herein alleged; however, defendants refuse to pay for said care and treatment.

31. Medical care and treatment are available which, if utilized, can detect damage to kidneys and muscle damage and other related diseases and illnesses and therefore early detection of the medical complications is possible and beneficial to plaintiffs and to all those persons who ingested the drug; however, defendants fail and refuse to pay for same.

32. As a proximate result of the aforesaid acts and conduct by defendants and each of them acting for and on their own behalf and as agents, ostensible agents, employees, conspirators and joint venturers of others, including the other defendants named herein, the drug was placed into the stream of commerce, distributed and sold and ingested by plaintiffs and the

class which plaintiffs seek to represent, and plaintiffs were damaged as hereinafter alleged.

COUNT I

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

33. The defendants are manufacturers and/or suppliers and/or distributors of the drug.

34. The aforesaid acts and conduct of defendants and each of them acting in the manner as alleged above were negligent and as a proximate result your plaintiffs and the class have suffered and will in the future suffer some or all of the following damages:

a. Medical and hospital bills for diagnostic and preventative treatment and for treatment of injuries;

b. Physical injury, both temporary and permanent;

c. Severe and significant emotional distress, and mental pain and suffering;

d. Humiliation, embarrassment and fear;

e. Loss of enjoyment of life;

f. Loss of income, past and present;

g. Disability;

h. Expenses reasonably necessary for the monitoring of the diseases associated with ingestion of the drug;

i. Annoyance and inconvenience; and/or

j. Other damages, which, under the law and circumstances, plaintiffs are entitled to, including attorney fees and costs associated with prosecution of this case.

35. In addition to the damages above, the personal representatives of those persons who have died as a proximate result of ingestion of the drug have incurred the following damages:

a. Severe and great sorrow, mental anguish and solace, society, companionship, comfort, guidance, kindly offices and advice of the decedent;

b. Loss of income of the decedent, services, protection, care and assistance provided by the decedent;

c. Expenses for the care, treatment and hospitalization of the decedent incident to this injury;

d. Reasonable funeral expenses;

e. The damages suffered by the deceased prior to his death; and

f. Emotional distress and loss of consortium and society.

36. In addition, the acts and conduct of defendants as alleged above entitle plaintiffs and/or their personal representatives to punitive damages, both individually and as a class as herein alleged.

COUNT II

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

37. Defendants are manufacturers and/or suppliers and/or distributors of the drug.

38. The acts and conduct of defendants as alleged above were intentional, knowing, reckless and wrongful and, as a proximate result, plaintiffs ingested the drug and were exposed to harmful toxins.

39. The defendants, and each of them acting as alleged above, intentionally inflicted emotional distress on plaintiffs and the class they seek to represent.

40. The acts and conduct of defendants were outrageous in that they offended the generally accepted standards of decency and morality of the community.

41. As a proximate result of defendants' acts and omissions, plaintiffs and the class have suffered and are suffering severe emotional diskess and were otherwise damaged as alleged above.

COUNT III

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

42. The defendants are manufacturers and distributors of products which were unreasonably dangerous and defective and which were placed in the stream of commerce by defendants.

43. The aforesaid drug was defective in that it was not properly conceived, designed, formulated, tested, researched, studied, packaged, distributed and sold and it was not accompanied by proper warnings and instructions and defendants are strictly liable to plaintiffs for their damages.

44. The product was defective in that when it was placed in the stream of commerce: (a) The foreseeable risks exceeded the benefits associated with the design or formulation, and/or (b) it was more dangerous than the ordinary consumer, including plaintiffs, would expect and more dangerous than other products marketed for the same purposes, and/or (c) the product did not have sufficient warnings or instructions in light of the dangers associated with the use of the drug, and/or (d) the drug was inadequately tested, and/or (e) for all the reasons alleged above and defendants are strictly liable to the plaintiffs for their damages.

45. As a proximate result of the product defect, plaintiffs and the class were damaged as alleged above.

COUNT IV

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

46. Defendants expressly warranted that the drug was safe for the uses intended, including the dosages and manner of taking, and that the drug's effect had been properly studied and proven

47. The drug does not conform to these express representations because it is not safe and has high levels of serious side effects, including life threatening side effects, as taken in the manner as advertised, marketed, and approved by defendants and is not effective as represented and defendants breached the express warranties.

48. As a proximate result of the breach of said warranties, plaintiffs and the class suffered and will continue to suffer injury, harm and economic loss as alleged above.

COUNT V

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

49. At the time defendants marketed, sold, and distributed the drug for use by plaintiffs, defendants knew of the use for which said drug was intended and impliedly warranted the product to be of merchantable quality and safe and fit for such use.

50. Contrary to such implied warranty, the drug was not of merchantable quality or safe or fit for its intended use, because the product was and is unreasonably dangerous and unfit for the ordinary purposes for which it was used as described above and defendants breached the implied warranties.

51. As a direct and proximate result of the breach of implied warranty, plaintiffs and the class suffered and will continue to suffer injury, harm and economic loss as alleged above.

COUNT VI

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

52. Defendants published, disseminated and/or circulated oral and written information and matter, including labeling, which tended to and/or did induce, directly and indirectly West Virginia residents, including your plaintiffs, to enter into contracts and agreements to purchase the drug, and to in fact purchase the drug which said publications were such that mislead and/or were calculated to mislead "physicians," and consumers in West Virginia.

53. Defendants, acting as aforesaid, directly or by agents, servants, employees, conspirators and/or joint venturers set about to sell, offer for sale, and attempt to sell in West Virginia for cash or credit the aforesaid drug and for services associated with said drug.

54. That the defendants acting as aforesaid set about to and did engage in unfair methods of competition and unfair or deceptive practices as set forth in West Virginia Code 46A-6-102(f), including but not limited to:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;
>
> Advertising, printing, displaying, publishing, distributing or broadcasting, or causing to be advertised, printed, displayed, published, distributed or broadcast in any manner, any statement or representation with regard to the sale of goods . . . which is false, misleading, or deceptive, or which omits to state material information which is necessary to make the statements therein not false, misleading or deceptive;
>
> Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

55. That the acts and conduct above violated West Virginia Code, Chapter 46A, Article 6, Section 101, et seq. in that defendants withheld information about the deleterious effects of the drug with the

intent that plaintiffs and the class would purchase the drug when defendants knew if the truth were published or provided to plaintiffs that they would not purchase the drug and for the other reasons alleged above.

56. As a proximate result of the violation by defendants of the aforesaid statute your plaintiffs and the class suffered an ascertainable loss of money or property and plaintiffs are entitled to recover damages all as provided in West Virginia Code, 46A-6-106.

COUNT VII

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

57. Defendants, by acts and omissions, misrepresented the safety and effectiveness of the aforesaid drug which acts and omissions were fraudulent, all as alleged above.

58. Plaintiffs and the class relied on the defendants' acts and omissions, purchased the drug, and were damaged as alleged above.

COUNT VIII

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

59. The acts and conduct of defendants caused the plainhffs and thousands of West Virginians to ingest and become exposed to the drug.

60. Plaintiffs were exposed to a significant amount of the drug as a proximate result of the negligent and intentional acts and omissions of defendants.

61. The drug has been proven to be a hazardous substance through the negligent actions of defendants.

62. As a proximate result of the aforesaid exposure, plaintiffs suffer a significantly increased risk of contracting serious and life threatening medical conditions.

63. That as a result of the aforesaid exposure to the drug, plaintiffs have been subjected to an increased risk where the need for medical and diagnostic examinations are required, recommended and supported by the many competent, reliable medical and regulatory experts and agencies and which is generally accepted by the medical community.

64. As a proximate result of the acts and conduct of defendants as alleged above, your plaintiffs and the class have been damaged in that they are required, pursuant to reasonable medical necessity, to undergo medical and diagnostic testing which otherwise they would not be required to undergo and to incur medical expenses that they otherwise would not be required to expend.

65. Further, as a proximate result of the acts and omissions of defendants as alleged above, your plaintiffs and the class have been greatly annoyed and inconvenienced, have suffered emotional distress as a result of having to undergo the tests and examinations, have undergone fear, humiliation, and

embarrassment, and have been otherwise damaged as alleged above.

66. Plaintiffs and the class have no adequate remedy at law and, therefore, medical monitoring and the establishment of a medical monitoring fund to pay for said monitoring, to a reasonable degree of medical probability, may prevent injury or death by notification of patients of the dangers and the proper procedures for monitoring, paying for the monitoring and other relief as the court deems appropriate, all of which is a proximate result of defendants' intentional, fraudulent and negligent misconduct as alleged above.

COUNT IX

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

67. At all times complained of herein the defendants designed, produced, formulated, marketed, distributed, prescribed, sold and/or otherwise supplied and placed the drug in the stream of commerce in the State of West Virginia.

68. The defendants' conduct in connection with the design, production, distribution, formulation, marketing, prescribing, selling and/or otherwise supplying and placing the drug in the stream of commerce in the State of West Virginia constituted breaches of the legally recognized duties to the plaintiffs set forth in this complaint.

69. The drug of the same type designed, produced, formulated, marketed, distributed,

prescribed, sold and/or otherwise supplied by the defendants in the stream of commerce in the State of West Virginia.

70. As a proximate result of ingesting defendants' drug plaintiffs have sustained the injuries set forth above in this complaint.

71. The defendants' conduct in designing, marketing, prescribing, producing, formulating, selling and/or otherwise supplying and placing the drug in the stream of commerce in the State of West Virginia proximately contributed to and increased the risk of plaintiffs' injuries.

72. Because each defendants' conduct increased or contributed to the risk of plaintiffs' injuries, each defendant individually and all defendants collectively are jointly and severally liable to each plaintiff for all injuries sustained by each plaintiff.

COUNT X

Plaintiffs incorporate all allegations above the same as if fully restated and re-alleged and plaintiffs further complain and say as follows:

73. The actions of each of the defendants named in this "Complaint" as set forth hereinabove, were done intentionally, maliciously, and/or with a reckless disregard for the rights of the plaintiffs and others, including the entire class, entitling the plaintiffs and the class to punitive damages for all causes of action alleged herein.

COUNT XI

Plaintiffs re-allege each and every allegation above and further complain and say as follows:

74. This civil action is an appropriate case to be brought and prosecuted as a class action by plaintiffs against defendants and certain classes of defendants pursuant to W.Va.R.Civ.P. 23.

75. There exists a class of individuals who took the drug subject in this complaint as a result of the acts and conduct of defendants as complained of above. This class includes all persons who ingested the drug and who are residents of West Virginia or who purchased the drug in West Virginia.

76. The claims of plaintiffs are typical of the claims of the class and the plaintiffs will fairly and adequately protect the interests of the class with respect to the appropriate common issues of fact and law and have hired counsel competent to prosecute said action for and on behalf of the plaintiffs and the class.

77. The prosecution of this civil action by all plaintiffs in separate actions would create a risk of varying adjudications with respect to individual members of the class, could be dispositive of interests of other members of the class not parties and/or they may impair or impede their ability to protect their interests and/or the defendants have acted or refused to act on grounds generally applicable to the class making declaratory or injunctive relief appropriate for the whole class.

78. The class includes thousands of West Virgmia citizens and is therefore so numerous that joinder of all members is impracticable.

79. There are questions of law and facts common to the class, including, but not limited to, the following:

a. Whether one or more of defendants violated the West Virginia Consumer Protection Act, W.Va. Code, 46A-6-101 et set., and whether defendants are liable to plaintiffs and the class as a consequence.

b. Whether the drug, based on the above allegations, was and is defective and whether the defendants or any of them are strictly liable to plaintiffs and the class.

c. Whether the plaintiffs and class may be entitled to medical monitoring damages.

d. Whether the defendants or any of them are liable to plaintiffs and the class for punitive damages and the amount thereof.

e. Such other factual and legal issues as are apparent from the allegations and causes of action alleged above.

80. The interest of members of the class, as to common questions of law and fact, in individually controlling the prosecution of separate actions do not outweigh the benefits of a class action as to those issues.

81. The difficulties in management of this case as a class action are outweighed by the benefits it has with respect to disposing of common issues of law and fact as to the large number of litigants, and it is desirable to concentrate the litigation in one forum for the management of this civil action due to the number of cases filed and pending and to be filed.

82. The questions of law and facts common to the members predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this civil action.

83. There are subclasses of individuals whose claims ma be more efficiently and appropriately adjudicated by class action.

84. Jurisdiction and venue are proper in Brooke County, West Virginia, pursuant to West Virginia law and the West Virginia Rules of Civil Procedure as the defendants do business in Brooke County, West Virginia.

85. Plaintiffs bring this action against the defendant physician individually and as representatives of the class of all physicians who prescribed, distributed, marketed, and/or sold the drug in the State of West Virginia and/or to residents of the State of West Virginia. Excluded from the class are any physicians against which the plaintiffs' claims would be deemed to arise out of or be preempted by federal law. Also, excluded from the defendant class are any physicians or other defendants who were insured by P.I.E. Mutual Insurance Company, Phico Insurance Company or any other insolvent insurer or

other insurer that has declared insolvency for the acts alleged herein.

86. The individually named plaintiff is a member of the class she seeks to represent. The members of the class are so numerous that joinder is impracticable and would involve thousands of litigants and the class in all other ways are similarly situated as required under Rule 23 of the W.Va. Rules of Civil Procedure and complies with the requirements thereof.

PRAYER

WHEREFORE, your plaintiff and the class she seeks to represent demand that they be awarded damages and equitable and affirmative relief as follows:

1. Compensatory damages and punitive damages in an amount to be determined by the Court and jury; and

2. Damages as provided for under and pursuant to W.Va. Code 46A-101 et seq., including compensatory and punitive damages and equitable and injunctive relief; and

3. An amount for medical monitoring expenses as determined by the Court or a jury; and

4. The costs and disbursements of this action, including attorney fees; and

5. Pre-judgment and post-judgment interest; and

6. Equitable and injunctive relief for providing notice and medical monitoring relief to plaintiffs and the class; and

7. That the Court find that this is an appropriate action to be prosecuted as a class action pursuant to W.Va.R.Civ.P. 23, and that the Court find that plaintiffs, and their counsel, are appropriate representatives and appropriate counsel for the class and that this action shall proceed as a class action on the common issues of law and fact all as this Court deems just and proper

8. For such other further and general relief, both compensatory, punitive, equitable or injunctive as is deems just and proper.

PLAINTIFFS DEMAND A TRIAL BY JURY.

KEITH SMITH

SHIRLEY SPERLAZZA

NANCY GANDEE

By: /s/ Michael G. Simon
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Exhibit F

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-191 (1-3) JPM
(Honorable James P. Mazzone)

[Dated October 1, 2008]

KEITH SMITH, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BAYER CORPORATION, a division of Bayer AG.,	)
	)
Defendant.	)
	)

PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS ACTION

Comes now the plaintiffs, by counsel, and move the Court for an order certifying the above styled case as a class action under West Virginia Rules of Civil Procedure 23.

The above named plaintiffs seek class certification for all West Virginia residents that purchased Baycol® in West Virginia. The plaintiffs request that the Court certify the class pursuant to claims raised in the accompanying memorandum of law.

For the foregoing reasons, plaintiffs pray that the Court grant their motion for class certification and grant all other relief the Court deems just and appropriate.

KEITH SMITH, et al.,

By Counsel

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IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-191 (1-3) JPM
(Honorable James P. Mazzone)

[Dated October 1, 2008]

KEITH SMITH, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BAYER CORPORATION, a division of Bayer AG.,	)
	)
Defendant.	)
	)

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF CERTIFICATION
OF CLASS ACTION

Introduction

Thousands of the citizens in this State risked injury, were bilked out of money and still face uncertainty as a result of the decision of the distributors of a prescription medication to put profits ahead of safety. Protecting the rights of thousands of West Virginia consumers who have been exposed to Baycol falls on this Honorable Court. The plaintiffs and their counsel strongly believe that the certification of a Rule 23 class action for consumer protection act claims provides the fairest and most efficient method

to resolve the claims of the numerous West Virginians who have been exposed to and purchased a defective drug.

For the reasons noted in this brief, prompt certification of this case as a class action will allow this Court to protect the unique rights of West Virginia consumers in a manner fair to both them and the defendants.

Facts

As this Court is aware, and as noted below, a determination of class certification is not a determination of the merits of the case. However, because class certification requires an examination of the nature of the class' claims, plaintiffs set forth in this statement of facts a summary of their liability and damage cases. Following that summary, plaintiffs set forth additional facts relevant to the class certification determination.

A. Baycol – A Rush to Profits Over Safety.

The drug at issue in this litigation, cerivastatin, sold under the trade name Baycol, was a drug marketed to treat high cholesterol. On August 8, 2001, Baycol in all dosages was withdrawn from the market because it was associated with unacceptable rates of rhabdomyolysis, a life threatening condition and because it was determined that the risks of taking the drug outweighed its benefits. To assist the Court in determining the certification issues raised in this suit, plaintiffs now present the history of Baycol which they purchased and which was sold to them as a safe and

equally effective alternative drug to other cholesterol lowering drugs on the market.

The market that Bayer chose to enter to sell Baycol was very lucrative and very competitive. Numerous competitor cholesterol lowering drugs were already on the market when Baycol arrived on the scene. Baycol was launched in the United States in January of 1998 in the .05, .1 and .3 mg. dosages. Later in July of 1999 the .4 mg. dosage and in August of 2000 the .8 mg. dosages were launched in the United States.

Bayer reported in 2001 that 6.5 million patients were treated with Baycol since its initial launch. Approximately 1.2 million of these patients were located in the United States. Based upon these figures thousands of West Virginians purchased Baycol. Exhibit 1.

Prior to launching Baycol in the United States, Bayer had indications that Baycol was not a safe drug. In November of 1995, Dr. Schleuter and Dr. von Keutz, who conducted studies on the toxicology of Baycol, determined that the proposed human dosages of Baycol were killing dogs in their test studies. Exhibit 2.

In June of 1997, Dr. Karabelas of Smith, Kline, Beecham reported to Dr. Ebsworth, President of Bayer's pharmaceutical division that Baycol caused cerebral hemorrhages in animal testing, suffered from multiple drug interactions causing deleterious side effects and that Baycol was not more effective than Lescol, a competitor.

Dr. Ebsworth was informed that due to these findings that marketing Baycol as a simple and safe drug no longer appeared to be a "viable promotional platform." Exhibit 3.

Despite early warnings that Baycol was unreasonably dangerous, Bayer chose not to perform any pharmokinetic interaction studies with gemfibrozil prior to launching Baycol. This interaction is the excuse that Bayer claims as its reason for withdrawing Baycol. Exhibit 1.

Once the drug was launched, Bayer continued to market Baycol in a less than honest way. In October of 1999, the Food and Drug Administration issued a letter to Bayer noting that its promotional material for Baycol was "false, lacking fair balance, or otherwise misleading." Exhibit 4.

Specifically, the letter noted that promotional material that implied clinical advantages for Baycol versus other statins was unsubstantiated. The letter noted that Bayer overstated the efficiency of Baycol and its promotional material in this regard was misleading. The letter stated that Bayer's claims that "Baycol is proven significantly better that Pravachol" is misleading because the claim is unsubstantiated. The letter finally notes that Bayer did not employ fair balance in presenting information relating to side effects and contraindications of Baycol. Exhibit 4.

An e-mail from Patricia Stenger sent to Richard Goodstein, both employees of Bayer, on February 23, 2000, states, "I am concerned that there is widespread knowledge in the field with both Bayer and SB representatives that there have been some deaths

related to Baycol. Cas has received a call from SB Product Management as well as from SB reps. Marc and Jim heard of deaths from the field as well, So much for keeping this quiet." Exhibit 5.

After many deaths, many consumers being faced with dialysis and Bayer seeing hundreds of millions of dollars in sales, Bayer crumbled under the pressure of public outcry and removed Baycol from the market. All of the hardship on the public could have been avoided had Bayer not chosen profits over safety.

We need to stretch the data – consistent with our labeling – to the maximum

(11) Other companies have developed an attitude of pushing marketing material aggressively, following the philosophy: "we do no know where the legal boundary is until we hit it".

(12) One may not value this – but since it is the rule in the market, we as a company have to follow it.

(13) The area is grayer than we treat it, e.g. we can pick the better study for the detail aid.

(14) It is the role of marketing to find ways to sell our product to the maximum, supported by Scientific Relations and Medical. It is the role of Marketing to challenge Regulatory systematically – and the role of Regulatory to prevent stupid mistakes.

Exhibit 6.

The Class, Class Representative and Class Counsel.

1. The Class.

Plaintiffs seek certification of the following class:

All West Virginia residents who purchased the drug Baycol in West Virginia.

Plaintiffs seek this certification with respect to their consumer protection act claims as set forth in the complaint.

Based upon Bayer's figures, thousands of West Virginians purchased Baycol.

In defining the class, it is important to delineate what the plaintiffs are not asking the Court to do. While plaintiffs seek broad inclusion of class members, plaintiffs do not seek broad issue and/or claim certification. Plaintiffs recognize that persons in the class have different medical histories and different injuries. Plaintiffs are not asking this Court to try all cases in one trial. Plaintiffs are asking the Court to certify the class as all persons who were sold the drugs in West Virginia and to manage the case through West Virginia's comprehensive and flexible Rules of Civil Procedure 23 by utilizing classes, sub-classes and conditional certification.

Essentially, all claims are common to each consumer who was charged for Baycol. Due to the cost of litigating this complex case, traditional class action claims will be lost if the Court fails to certify this case.

The following are most of the claims and issues that are common to all plaintiffs and all class members:

1. Was the product defective in that it was not reasonably safe for its intended use?

2. Was the product defective in that its instructions and warnings were not adequate?

3. Did defendant breach its warranty to plaintiffs?

4. Did defendant violate West Virginia Code 46A-6-1 et seq., the West Virginia Consumer Protection Act, and, if so, what damages may plaintiffs recover under that statute?

5. Did defendant intentionally injure persons in the class?

6. Did the defendant recklessly, willfully, intentionally, or otherwise engage in conduct subjecting it to punitive damages in this case and, if so, what are the punitive damages that this defendant should pay?

The above list of common issues is not meant to be exhaustive. However, reference to these issues demonstrates the reason that one trial on these or some of these issues would be far superior to a series of trials to establish the same things over and over again.

2. The Class Representatives All Have Common Interests With All Individuals in West Virginia Who Were Charged For Baycol.

Your plaintiffs were the first individuals from West Virginia to file a lawsuit asking for class status. All of these individuals purchased Baycol.

Unlike many other fact situations and cases, the description of who falls within the class is very simple. If a consumer was charged for Baycol in West Virginia, then they fall into a group that deserves compensation for the improper charge perpetrated upon them.

Further, each of the class members is interested in this wrong and wish for it to be righted for them and their fellow class members.

The class members understand that they have certain duties as follows:

a. To represent the interests of the absent class members;

b. To not place my interests over the interests of the absent class;

c. To vigorously prosecute my claims and the claims of the class against the defendants;

d. To cooperate with my attorneys by assisting them in completing discovery, conducting investigations, making myself available for trials and hearings, and complying with the orders of the court; and

e. To keep informed of the status of the case and assist my attorneys in making decisions regarding the conduct of the case.

They further have stated they understand that the complexity of class action makes the management and settlement of my claims more complicated and time consuming. Regardless, they ask the Court to appoint them. They express that they agree to perform these duties and believe that they are able to perform them.

None of them were aware that the drug was unreasonably dangerous for its intended use or less effective than other drugs on the market when they purchased Baycol. Plaintiffs would not have purchased Baycol with knowledge of the aforesaid and believe they were misled to buy this defective drug.

3. Class Counsel.

Class counsel in this case include class counsel in numerous class actions. Class counsel in the case before the Court have extensive experience in litigating complex product liability, commercial, and class actions. Class counsel are currently representing state and national classes in other litigation pending in West Virginia and elsewhere. (See Exhibit --.)

I. In Determining Whether To Certify This Case As A Class Action, Rule 23's History And The West Virginia Supreme Court's Decision In The West Virginia Rezulin Litigation Mandates That Rule 23 Be Liberally Interpreted To Accomplish Its Purposes And That The

Court Avoid An Examination Of The Merits of Plaintiffs Claims.

The Supreme Court of Appeals of West Virginia recently addressed in great depth the purpose of Rule 23 of the West Virginia Rules of Civil Procedure in In Re West Virginia Rezulin Litigation 585 S.E.2d 52 (W.Va. 2003) (a copy is attached hereto) The Court's discussion of the purpose of the rule is as follows:

> Rule 23 of the West Virginia Rules of Civil Procedure [*23] governs the establishment of class actions in West Virginia. "In general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers." McFoy v. Amerigas, Inc., 170 W.Va. 526, 533, 295 S.E.2d 16, 24 (1982). The rule is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims. See e.g., Life of the Land v. Land use Commission of State of Hawaii, 63 Haw. 166, 623 P.2d 431, ___, 63 Haw. 166, 623 P.2d 431, 442 (1981); Lilian v. Commonwealth, 467 PA.15, 354 A.2d 250, ___, 354 A.2d 250, 253 (1976)
>
> Rule 23 provides trial courts with a tool to vindicate the rights of numerous claimants in one action when individual actions might not be impracticable. Hicks v. Milwaukee County, 71 Wis.2d 401, 238 N.W.2d 509 (1976). A primary function of the class action is to provide a mechanism to litigate small damage claims which could not otherwise be economically

litigated. As we stated in State ex rel. Dunlap v. Berger, 211 W.Va. 549, 562, 567 S.E.2d 265, 278 (2002) [*24] (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689,709 (1997)):

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

"The party who seeks to establish the propriety of a class action has the burden of proving that the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure have been satisfied." Syllabus Point 6, Jefferson County Board of Education v. Jefferson County Education Association, 183 W.Va. 15, 393 S.E.2d 653 (1990). As we have observed, "whether the requisites for a class action exist rests within the sound discretion of the trial court." Syllabus Point 5, Mitchem v. Melton, 167 W.Va. 21, 277 S.E.2d 895 (1981). A circuit court should determine whether the prerequisites of a class action have been established "as soon as practicable after the commencement [*25] of [the] action." Rule 23(c)(1).

The Supreme Court further discussed the considerations a circuit court should undertake with regard to a motion for class certification.

A circuit court's consideration of a motion for class certification should not become a mini-trial on the merits of the parties' contentions. As we stated in Burks v. Wymer, 172 W.Va. 478, 486 307 S.E.2d 647, 654 (1983)(quoting Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 2152, 40 L. Ed. 2d 732, 748 (1974)), "Nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

Allowing inquiry into the substantive merits of a party's claims or defenses in the context of a class certification motion deprives the party of the right to trial by jury on the claims. See Guarantee Ins. Agency – Co. v. Mid-Contentental Realty Corp., 57 F.R.D. 555, 564 (D.C.Ill.1972). Because Rule 23 requires a circuit court to rule on a class certification motion "as soon as practicable," consideration of the merits of the parties' claims would often amount to a court considering summary judgment [*26] before the parties have had adequate time for discovery. Moreover, consideration of the merits of a party's claims or defenses is discouraged by the express language of the rule, because Rule 23(c)(1) states that courts should rule upon, alter, or amend any decision about a class certification motion "before the decision on the merits." n7

* * * * *

Accordingly, when a circuit court is evaluating a motion for class certification under Rule 23,

the dispositive question "is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Miller v. Mackey Intern., Inc., 452 F.2d 424, 427 (5th Cir. 1971).

Id. at

The Supreme Court, in In re: Rezulin, then discussed the requirements for class certification under Rule 23(a).

Requirements for Class Certification under Rule 23(a)

Rule 23 specifies that the party seeking class certification must meet all four requirements under Rule 23(a), and meet one of the three requirements under Rule 23(b). n8 The four prerequisites that a party must meet under Rule 23(a) before a case may be certified as a class action are: (1) that the class is so numerous that joinder of all members is impractical (the "numerosity" requirement); (2) that there are questions of law or fact common to the class (the "commonality" requirement); (3) that the claims or defenses of the representative parties are typical of those of the class (the "typicality" requirement); and (4) that the representative parties will adequately protect the interests of the class (the "adequacy of representation" requirement).

* * * * *

Rule 23(b) sets forth the following types of class actions that are maintainable and their requirements, of which the moving party must qualify under only one:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions [*30] affecting only individual members, and that a class action is superior to other available methods for

the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

In sum, before certifying a class, a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a) - numerosity, commonality, typicality, and adequacy of representation - and has satisfied one of the three subdivisions of Rule 23(b). n9 See Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594, 595 n.2 (4th Cir. 1976) ("To maintain a class action, one must satisfy all four of the provisions of [Rule 23] section (a) and one of the subdivisions of section (b)."). As [*31] long as these prerequisites to class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party. Mitchem v. Melton, 167 W.Va. 21, 28, 277 S.E.2d 895, 899 (1981) ("If the requirements of Rule 23 are met, then the class should be allowed."). Any question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification. Esplin v. Hirschi, 402 F.2d 94, 101

(10th Cir. 1968), cert denied, 394 U.S. 928, 22 L. Ed. 2d 459, 89 S. Ct. 1194 (1969) ("The interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action.").

II. In Determining Whether The Class Should Be Certified, The Court Should Not Resolve Issues Regarding The Merits Of Plaintiffs' Claims.

Plaintiffs anticipate that the defendants intend to convince the Court that a class should not be certified because the plaintiffs' claims lack merit. Such an inquiry is clearly improper at this stage of the litigation. As the Rules themselves now make clear, the Court shall determine the suitability for class treatment "as soon as practicable." Rule 23(c)(1). The law is settled that such an examination of the merits of the claim in connection with a class ruling is improper. As the United States Supreme Court has stated:

> [N]othing – in either the language or history of Rule 23. . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule ..."

Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974) (emphasis added). In re West Virginia – Rezulin Litigation 585 S.E.2d 53 (W.Va. 2003) While our Supreme Court has accepted the fact that some discovery needs to be undertaken to understand the nature of the proposed class, it has explicitly cautioned

litigants and judges that "pre-trial hearings are to be carefully limited." Burks v. Wymer, 307 S.E.2d 647, 654 (W.Va. 1983) (quoting Eisen v. Carlisle and Jacquelin, 417 U.S. at 177 with approval). "We quite agree that the trial court's guess as to which party would prevail at trial should have no bearing on the allowance or disallowance of a proposed class action." Id. Numerous Courts have followed Eisen's holding and refused a defendant's request to undertake an examination of plaintiffs' claims in connection with a class determination. See Eggleston v. Chicago Journeyman Plumbers, 657 F.2d 890, 895 (7th Cir. 1981) (citing Eisen); Harris v. General Develop. Corp., 127 F.R.D. 658 (N.D. Ill. 1989) ("For the purpose of ruling on plaintiffs' motion for class certification, plaintiffs' allegations are taken as true and the court may not make an inquiry into the merits of the lawsuit."); Peil v. National Semiconductor Corp., 86 F.R.D. 357, 365, 368 (E.D.Pa. 1980) ("The Court, when properly exercising its discretion, may consider the pleadings and facts procured through the discovery process to 'identify the character or type (but not the merits) of . . . plaintiff's claim and then to determine whether there was a class . . . . The Court will not engage in a discussion of the merits of the plaintiff's case in relation to this standard. [Eisen, supra]").

The basis for this rule is two-fold. First, the suitability of a case for class certification does not depend on whether the plaintiffs will ultimately prevail. See, e.g., Rule 23(c)(3). Secondly, the time for determining class certification ("as soon as practicable") renders examination of the merits impractical. In essence, examining the merits at this stage amounts to an improper granting of summary judgment on the claims of the class. Cf. Williams v.

Precision Coil, Inc., 459 S.E.2d 329, 338 (W.Va. 1995) (summary judgment proper only after the nonmoving party has enjoyed adequate time for discovery, and summary judgment prior to completion of discovery is precipitous); Board of Educ. of the County of Ohio v. Van Buren, 267 S.E.2d 440, 443 (W.Va. 1980) (same). Just as this Court would not grant summary judgment on the merits at this stage, it should avoid an examination of the merits of the plaintiffs' claims that will effectively grant summary judgment to the absent class members.

(11) This Case Is Appropriate For Class Certification Under West Virginia Rule of Civil Procedure Rule 23(a)

In order to determine whether a class can be certified the Court must also apply the four part test of Rule 23(a) which permits a class action if the party seeking certification can show:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. For the reasons noted below, plaintiffs' proposed classes easily meet these requirements.

A. The Proposed Class Is So Numerous That Joinder Of All Members Is Impracticable.

The requirement of Rule 23(a)(1) that joinder of all members of the class be impracticable is commonly known as the numerosity requirement. In order to show numerosity, it is not necessary to establish that the joinder is impossible; rather, the test is impracticability. Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n, 343 S.E.2d 653, 660 n.18 (W.Va. 1990) ("'[T]he test for 'impracticability' of joining all members does not mean 'impossibility' but only difficulty or inconvenience of joining all members.'") (quoting Mitchem v. Melton, 277 S.E.2d 895, 902 n.7 (W.Va. 1981)). In re West Virginia Rezulin Litigation 585 S.E.2d 53 (W.Va. 2003) In this case the numerosity requirement is easily met.

As noted above, the defendants have sold this defective drug to 6.5 million consumers since Bayer placed Baycol on the market in 1998[1]. Even if it were possible in the theoretical sense, the impracticability of joining all class members is evident especially when a class action will provide a viable, more efficient alternative.

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[1] Bayer has not provided the exact number of West Virginians who purchased this drug, but does have such information. More than a million Americans took Baycol.

B. There Are Numerous Questions Of Law And Fact Common To The Plaintiffs' Proposed Class.

The second requirement of Rule 23(a) is that there be questions of law or fact common to the class, the commonality requirement. Rule 23(a)(2). The commonality requirement is met if plaintiffs can demonstrate one or more common questions of law or fact. See Burch, supra pp. 25-26. In re West Virginia Rezulin Litigation 585 S.E.2d 53 (W.Va. 2003) The standard is not high. See id. As set forth above, in this case there are many substantial common issues. See page 6. With respect to resolving these common issues, the Court would be required to receive much of the same testimony from both the plaintiffs and the defendants.

C. The Claims Of The Representative Plaintiffs Parties Are Typical Of The Claims Of The Class Members.

The third requirement of Rule 23(a) is that the claims of the representative plaintiffs be typical of the claims of the class members as a whole. This requirement is known as typicality. The focus of typicality is whether the plaintiff's claims are similar to that of the rest of the class. It is not necessary that plaintiff have identical claims to everyone in the class. This is simply not the "typicality" requirements for class representation. The test is whether their interests are "similar to and consistent with those of the other members. of the purported class." (59 Am.Jur.2d, Parties, § 61, p. 469). As stated therein:

> It has been said that under the federal rule, only two factors need be met in order for a court to determine that the representative party will fairly and adequately protect the interests of the class he seeks to represent: (1) the representative party must be interested enough to be a forceful advocate and his chosen attorney must be qualified, experienced, and generally able to conduct the litigation; and (2) the representative party must have interests which are compatible with and not antagonistic to those whom he would represent. Also it has been recognized that the court need concern itself only with whether those members who are actual parties are interested enough to be forceful advocates, and with whether there is reason to believe that a substantial portion of the class would agree with their representatives, were they given a choice.

See also In re: Southeast Hotel Properties Ltd. Partnership Investor Litig., 51 F.R.D. 597 - (W.D.N.C. 1993); Pruitt v. Rockefeller Center Properties, Inc., 574 N.Y.S.2d 672 (1991). The law does not require that a named plaintiff be the perfect class member or even the best available. Shutts v. Phillips Petroleum Co., 679 P.2d 1159 (Kan. 1984). In re West Virginia Rezulin Litigation 585 S.E.2d 53 (W.Va. 2003)

Like commonality, this element is easily met in this case. As noted above, plaintiffs claim that they were unknowingly sold a defective, dangerous drug whose efficacy was fraudulently touted.. With respect to the common issues noted above, each of the plaintiffs' claims are typical. For example, plaintiffs intend to prove that all class members were defrauded due to

the concealment or omission of the efficacy unreasonable danger associated with the use of Baycol. Thus, because the charge and omission to inform will be claimed as the basis for this claim, the class and the representatives have nearly identical claims. Also, plaintiffs' claim of violation of the West Virginia Consumer Protection Act, W.Va. Code 46-6A-1 et seq., with its statutory damages also is uniquely common to all class members.

D. The Plaintiff Class Representative Parties Will Fairly And Adequately Protect The Interests Of The Class.

The final Rule 23(a) requirement is that the representative parties fairly and adequately protect the interests of the class. This requirement is known as the adequacy requirement.

Initially, it is important that the Court view the defendants' interest correctly. As the Court noted in Eggleston v. Chicago Journeyman, 657 F.2d 890, 896 (7th Cir. 1981), defendants interest is not in protecting the class members; instead, their interest is in avoiding being sued by the victims of their fraudulent and illegal activity:

> The burden of establishing class requirements rests on plaintiff . . . but it is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether 'the representative parties will fairly and adequately protect the interests of the class,' or the

> plaintiffs' ability to finance the litigation, it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house. (Emphasis added).

With this perspective in mind, plaintiffs now turn to the specifics of the defendants' likely challenges.

The purpose of the adequacy test is to assure that the interests of the absent class members will be protected by the proposed representatives. The most commonly used test for adequate representation was first set forth by the Second Circuit:

> What are the ingredients that enable one to be termed "an adequate representative of the class?" To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. . . . Courts, on occasion, have also required that the interest of the representative party be coextensive with the interest of the entire class, but this amounts to little more than an alternative way to stating that the plaintiff's claim must be typical of those of the entire class, an element we have already discussed. . . However, we believe that reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted. Language to the effect that a small number of claimants cannot

> adequately represent an entire class has frequently been cited, . . . but we fail to understand the utility of this approach. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed. As has previously been stated, one of the primary functions of the class suit is to provide "a device for vindicating claims which, taken individually, are too small to justify legal action but which are significant size if taken as a group." . . . Individual claimants who may initially be reluctant to commence legal proceedings may later join in a class suit, once they are assured that a forum has been provided for the litigation of their claims. . . . But to dismiss a class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation, . . . and that the dismissal in limine of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.

Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968). Following the recitation in Eisen, the Courts have distilled the adequacy requirement down to two factors: "(1) absence of conflict and (2) assurance of vigorous prosecution." Newberg supra § 3.22 at 3-126. When the plaintiffs in this case are examined in

light of this test, it is clear that they meet the requirements of Rule 23.

(1) Plaintiffs' interests do not conflict with the interests of the class.

There is no assertion that plaintiffs have any direct conflict with the class. Nor is there any-evidence that this case involves a collusive suit between the parties. Plaintiff Stepp, and the other class representatives, are not former or current employees of any of the defendants. Nor have they been shown to have any financial interest in the litigation apart from their claims for damages. They have acknowledged their duties as class representatives. Finally, it is clear that the showing that their claims are typical creates a sufficient showing that there is no conflict between the plaintiffs and the class.

If there is a conflict, the Court may divide the class into subclasses. In the exercise of its discretion, however, the Court should defer identification of the subclasses, if any, until after the class has been notified. Similarly, interventions will lead to even a more representative class representatives. Opt outs by class members and other information received during the notice process will allow the Court to more accurately evaluate the need for and the exact contours of any subclasses.

(2) Plaintiff is vigorously prosecuting this case.

The vigorous prosecution prong focuses on the competence and experience of counsel for the class. See Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 (7th Cir.

1977); Harris v. General Develop. Corp., 127 F.R.D. 655 (N.D. Ill. 1989); In re Workers' Compensation, 130 F.R.D. 64, 67 (D.Col.1989); see also Newberg, supra, § 3.24 ("courts focus primarily on class counsel, not the plaintiff, to determine if there will be vigorous prosecution of the class action"). Adequacy, absent evidence to the contrary, is a factor that should be presumed. Newberg, supra. In this case it is clear that the requirement has been met. Class counsel have been involved in class actions, mass torts, and other complex civil litigation, and counsel and the class representatives are vigorously pursuing the defendants in this case. Unless the defendants contest the issue, plaintiffs and the Court should presume counsel's adequacy.

(12) This Case Is Appropriate For Class Certification Under West Virginia Civil Procedure Ruled 23(b)

Under amended Rule 23, a class representative must establish all of the requirements of Rule 23(a) and meet at least one of the tests of Rule 23(b). In this case, the requirements of Rule 23(a) should not be the subject of any serious dispute. Consequently, plaintiffs will now set forth their proposed issues and claims for certification and the Rule 23(b) basis.

A. Plaintiffs' Claims Under The Common Law Fraud And Consumer Protection Act Satisfy The Elements Of Rule 23(b) (3).

In Counts VI and VII of plaintiffs' Complaint, plaintiffs bring claims under fraud and the West

Virginia Consumer Protection Act ("Act"), W.Va. Code, 46A-6-101, et seq.. The provisions of this remedial act are well-suited for allowing adjudication on a class basis under the provisions of Rule 23(b)(3).

Section 46A-6-101(1) of the Act provides, in part, that the purpose of the Act is to assist in preventing "unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition . . . [and that] [t]o this end, this article shall be liberally construed so that its beneficial purposes may be served." The Act sets forth a private cause of action for consumers and provides that each consumer may "recover actual damages or two hundred dollars, whichever is greater," for each violation of the Act, in addition to declaring that the "court may, in its discretion, provide such equitable relief as it deems necessary or proper." W.Va.Code § 46A-6-106(1).

Section 46A-6-104 of the Act specifically provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The Act sets forth an inexhaustible list of examples of conduct which constitute "unfair methods of competition and unfair or deceptive acts or practices" in § 46A-6-102(f). In light of the allegations contained in plaintiffs' complaint, it is worth noting, by way of example only, the following specific types of conduct which is declared by the Act to constitute unfair methods of competition and unfair or deceptive acts or practices:

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that

they do not have, or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(7) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(9) Advertising goods or services with intent not to sell them as advertised.

(11) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions.

(12) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(13) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, **whether or not any person has in fact been misled, deceived or damaged thereby;**

W.Va.Code § 46A-6-102(f) (emphasis added).

In this case the liability issues with respect to the Act are the same or similar with respect to the claims

of the plaintiffs and the class. For example, as detailed above, discovery has shown and it has been plead that the defendants withheld material information from every consumer that their drug was unreasonably dangerous for its intended use and had to be withdrawn from the market. These acts would constitute deceptive practices under the Act. All consumers of the defendants' services would have claims against the defendants because of these deceptive acts regardless of whether they relied on the statements. Thus, the common questions of law and fact should be tried on a class basis regardless of whether defendants' conduct was deceptive or whether it violated the Act.

These common questions regarding claims under the Act predominate over any individual issues. First, with respect to liability, there are no individual issues. The plaintiffs' claims arise out of corporate conduct that was directed at all the plaintiffs and all class members alike. Second, there are no individual issues with respect to reliance as the act does not require a plaintiff to prove reliance as an element of his claim. With respect to causation and damages, each plaintiff will be entitled to statutory damages adjusted for inflation per violation or his actual damages whichever is greater.

Rule 23(b)(3) identifies four factors that should be examined by the court to determine whether class treatment would be fair and efficient.

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(3)(A)-(D). Each of these factors favor certification of plaintiffs' consumer protection claims.

The class members certainly have little interest in individually managing the consumer protection claim. The proof of the violations of the act will be identical with respect to each class member. See Newberg supra § 3.13 (strong showing of typicality and commonality favors class certification under Rule 23(b)(3)(A)). Secondly, should there be an unlikely individual member of the class with an atypical claim, or an individual interest in prosecuting the consumer protection claims, that individual may opt out of the class and prosecute an individual claim. Rule 23(c)(2).

The remaining factors favor class certification. With respect to the claims of West Virginia residents, this case appears to be the only case filed by plaintiffs, and they favor class action. Finally, any difficulties in managing this case as a class action pale in comparison to the difficulties in individually trying these cases. As noted above, the utility of Rule 23, properly used, in the mass tort context benefits the plaintiffs and the defendants in the form of lower litigation costs and the court system in a more efficient

use of scarce judicial resources. See Teletronics, 172 F.R.D. at 275-76. In re West Virginia Rezulin Litigation 585 S.E.2d 53 (W.Va. 2003)

In sum, Rule 23(b)(3) presents the Court with the authority to determine the issue of plaintiffs' consumer protection claims. State consumer protection claims are commonly certified for adjudication on a class basis. See Newberg, supra, §§ 21.28, 21.29. For the reasons noted above equity, expediency, and efficiency argue for certification of these claims.

B. The Court Should Certify the Issue of Punitive Damages under the Provisions of Rule 23(b)(1) and Rule 23(b)(3).

Plaintiffs request that the Court certify their punitive damages under the provisions of Rule 23(b)(2). Just as the issues regarding causation are conducive to class adjudication, so are the issues related to punitive damages. With respect to punitive damages, the focus is the defendant's conduct, not the plaintiffs' actions. As such, class certification presents a proper method of adjudication of these claims. This is particularly true as here where the target of bad conduct was an entire group. Classlike adjudication of punitive damages already has been accomplished through mass consolidation. See, e.g., In re: Asbestos III, supra.

A class determination is superior to the consolidation determination or the individual determination because, the defendants' liability for punitive awards is based on their conduct and can then be determined at once. Defendants' usual

objections concerning receiving multiple punishments for the same conduct can be accommodated. Several courts have accomplished this on a class basis. See Burch v. AHP, supra pp. 44-45; Cimino v. Raymark Indus., Inc., Memorandum and Order (E.D. Tex. 1990). Indeed, in another mass tort context, Judge Haden has tried two punitive claims on a class basis finding the requirements of Rule 23(b) met. See Henley v. FMC Corp., No. 2:95-1098 (S.D.W.Va. 1997); Black v. Rhone Poulenc, Inc., 173 F.R.D. 156 (S.D.W.Va. 1996).

The efficiency of this approach is obvious. The evidence of the defendants' conduct, assets, knowledge, etc. will be the same in every case, and the compensation is simply increased by a multiplier. Defendants' claims of entitlement to bifurcation because the alleged prejudice caused by the evidence relevant only to the punitive claims will only have to be resolved once. Such a procedure is both fair to both sides and efficient to the parties and the court.

CONCLUSION

West Virginia Rules of Civil Procedure 23, like the federal counterpart, was implemented for this set of circumstances – a large number of plaintiffs with the same or similar complaints with common issues against the same defendants. The need for class certification is further accentuated by the size of the claims compared to the complexity and expense of litigation and the time required of a court to manage the claims individually. Plaintiffs respectfully move the Court to order certification of this class and to grant them such other further and general relief as the Court deems just and proper to implement the requirements of West Virginia Rule 23 for this action.

KEITH SMITH, et al,

By Counsel

/s/ Charles M. Love
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IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-191 (1-3) JPM
(Honorable James P. Mazzone)

[Dated September 30, 2008]

KEITH SMITH, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BAYER CORPORATION,	)
a division of Bayer AG.,	)
	)
Defendant.	)
	)

NOTICE OF MOTION

Please take notice that the undersigned will bring on the foregoing "Plaintiffs' Motion For Certification Of Class Action" before the Honorable James P. Mazzone, Judge of the Circuit Court of Ohio County, Wheeling, West Virginia on Wednesday, December 10, 2008, at 9:00 a.m., at which time you may appear and protect your interests if you so desire.

Dated this 30th day of September, 2008.

/s/Charles M. Love
Charles M. Love, IV, Esquire
West Virginia State Bar No. 7477
The Masters Law Firm lc

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Charleston, West Virginia 25301
(304) 342-3106
Counsel for Plaintiff

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* * *

[*Certificate of Service Omitted in Printing of this Appendix*]

EXHIBIT H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
Case No. 03-5984

[Filed October 23, 2008]

In re BAYCOL PRODUCTS LITIGATION	)
	)
Maria Ballard,	)
	)
Plaintiff,	)
	)
v.	)
	)
Bayer Corp.,	)
	)
Defendant.	)
	)

MEMORANDUM OF LAW & ORDER

Marvin W. Masters, Charles M. Love, IV, The Masters Law Firm, LC, Counsel for Plaintiff, Maria Ballard.

Philip S. Beck, Adam Hoeflich, Bartlit, Beck, Herman, Palenchar & Scott, LLP; Susan A. Weber, James W. Mizgala, Sherry A. Knutson, Thomas P. Hanrahan and Paul J. Zidlicky, Sidley Austin, LLP; Richard K. Dandrea, Eckert, Seamens, Cherin & Mellott, LLC; Peter W. Sipkins, Dorsey & Whitney, LLP; Douglas R. Marvin, Williams & Connolly; Erik

W. Legg, Farrell, Farrell & Farrell, PLLC, Counsel for Defendant, Bayer Corporation.

I. INTRODUCTION

This matter is before the Court on Defendant's Motion for Summary Judgment [Docket No. 4].

II. FACTUAL BACKGROUND

Plaintiff Maria Ballard, a West Virginia resident, has a history of medical conditions including high cholesterol, hypertension, elevated triglycerides, diabetes, peripheral neuropathies, and kidney damage connected to her diabetes.

On January 15, 2001, Plaintiff's primary care physician, Dr. Thomas Steele, D.O. prescribed 10 mg of Lipitor. While taking Lipitor, Plaintiff complained she felt "dizzy, a little bit tired, [and that she had] some achiness in her neck." (Ballard Medical Records (Def.'s Ex. C) at TS000010mimb (noting a combination of issues including diabetes, arthritis, or statin use); (Dep. of Thomas Steele, D.O. (Def.'s Ex. B) at 79:16-23; 82:10-13 (attributing Plaintiff's complaints as "secondary to getting her diabetes better controlled.").) Dr. Steele discussed switching Plaintiff to Baycol during a February 21, 2001 office visit.

Dr. Steele testified that at the time he was treating Plaintiff, from approximately 1996 to 2002, he did not have "printouts of data" for patient education. (Steele Dep. (Def.'s Ex. B) at 25:19-24.) Rather, Dr. Steele testified that he addressed product labeling orally as opposed to handing out written information. (Id. at

26:10-11.) Specifically, he would "discuss the benefits and risks, side effects, and the perils of using the product . . . and try to explain to [patients] the best that [he] could to make them understand the risk and the follow-up." (Id. at 27:9-20.)

On April 2, 2001, Dr. Steele started Plaintiff on 0.4 mg of Baycol by providing her with six weeks of samples. With respect to Baycol, Dr. Steele testified that if a sales representative left him with a promotional piece or information, he would scan or read it, then throw it away. (Id. at 46:8-20. He also testified that he was not sure whether or not he ever gave Plaintiff product insert information regarding Baycol. (Id. at 47:5-13.)

On May 7, 2001, Plaintiff saw Dr. Steele that with regard to her diabetes. During this visit, Dr. Steele testified Plaintiff complained about her arthritis and osteoporosis. To address her concerns, Dr. Steele ran a series of labs which revealed Plaintiff's liver function was normal and her lipids had improved. (Steele Dep. (Def.'s Ex. B) at 86:9-14; id. at 86:12-23 (finding lipids were good, "super" while on Baycol, cholesterol 192, LDL 96, HDL 58, triglycerides 188.) Acknowledging Baycol worked to reduce Plaintiff's cholesterol levels, Dr. Steele wrote a prescription for 0.4 mg of Baycol to continue her therapy. (Id. at 88:8-20.)

On June 21, 2001, Plaintiff complained to Dr. Steele that she felt dizzy, her legs were weak, and she had numbness in the tips of her feet. (Id. at 91:8-24; 92:1-7; Ballard Medical Records (Def.'s Ex. C) at TX00006mimb.) Based on Plaintiff's complaints, Dr. Steele ordered a CPK test, which showed her CPK was

"moderately elevated" at 254 (n<135). (Steele Dep. (Def.'s Ex. B) at 96:15-24.)

Because of her complaints of leg weakness and her elevated CPK levels, Dr. Steele called Plaintiff on June 22, 2001 to tell her to stop taking Baycol immediately. In a note memorializing the phone call, Dr. Steele indicated that based on Plaintiff's complaints of leg numbness and weakness and her elevated CPK "I believe she is having adverse reaction to Baycol, so stop the Baycol. Unfortunately, she is unable to utilize any statin." (Steele Dep. (Def.'s Ex. B) at 95:15-21.) When asked about the basis for his opinion that Plaintiff was experiencing a Baycol-related incident, Dr. Steele indicated "probably the fatigue and probably the CPK being elevated." (Id. at 96:10-14.)

Both Plaintiff and her husband testified that when Dr. Steele called, he actually spoke with Mr. Ballard, not Plaintiff. (Dep. Jack Ballard (P.'s Ex. 3) at 31:2-32:13.); (Plaintiff Dep. (Def.'s Ex. D) at 8:14-22.)

On August 1, 2001, Plaintiff saw Dr. Steele in connection with her diabetes. Plaintiff indicated that while she continued to experience dizziness and weakness, her legs no longer ached. (Ballard Medical Records (Ex. C) at TS000004mimb.) On October 1, 2001, Dr. Steele prescribed 20 mg of Pravachol. On January 14, 2002, Plaintiff complained of "continued weakness and distal tingling and 'pings' sensation" in her legs that caused "difficulty climbing stairs without assistance." (Id. at TS000002mimb.) Dr. Steele attributed these pains to Plaintiff's "diabetic neuropathy" and "Type II diabetes not controlled." (Id.)

In 2002, Plaintiff began seeing Dr. Thomas Von Dohlen. On March 19, 2002, Plaintiff complained to Dr. Von Dohlen of weakness and other related symptoms. (Dep. of Thomas Von Dohlen, M.D. (Def.'s Ex. F) at 19:7-17.) As a result, Dr. Von Dohlen ordered a CPK test, which revealed results that were "mildly elevated." (Id. at 19:14-24; 20:1-11.) Ultimately, Dr. Von Dohlen discontinued Pravachol after he determined Plaintiff had developed "myositis secondary" to Pravachol. (Id. at 23:5-14; 47:3-10.)

Plaintiff complains she noticed a variety of adverse symptoms approximately five weeks after initiating Baycol therapy that have never gone away. Specifically she alleges muscle pain, weakness, aches and tingling, problems walking and lifting her legs, spasms, loss of balance and general cramping. (See Plaintiff Fact Sheet ("PFS") (Def.'s Ex. A) § VI.A(1); Plaintiff Dep. (Def.'s Ex. D) at 118:22-24; 119:1-7; 120:5-21; 124:3-24; 126:9-12; 127:13-20.)

Plaintiff filed this action on August 7, 2003 alleging claims for negligence, intentional infliction of emotional distress, strict products liability, breach of express warranty, and breach of implied warranty, unfair competition, fraud, medical monitoring, and punitive damages as a result of her ingestion of Baycol.

Defendant moves for summary judgment and argues: (1) Plaintiff's claims are barred by West Virginia's two year statute of limitations; (2) Plaintiff lacks expert testimony linking her Baycol use to her alleged injury; (3) Defendant's Baycol warnings were adequate and warned of the risk of developing muscle pain; (4) Plaintiff has not and cannot identify any deceptive advertisements or representations she relied

on to support her fraud and unfair competition claims; and (5) Plaintiff lacks the evidence necessary to recover damages for medical monitoring.

Plaintiff opposes summary judgment and argues: (1) the West Virginia statute of limitations is tolled until a claimant knows, or by reasonable diligence should know, of her claim; (2) Dr. Gregory W. Rutecki offers competent and well based opinion testimony to a reasonable degree of medical probability that Plaintiff received an injury due to her ingestion of Baycol; (3) Defendant misrepresents the law with regard to Plaintiff's consumer protection claims, because evidence of reliance is not necessary for a prima facie violation of the West Virginia Consumer Credit Protection Act; and (4) the question of adequacy of a warning is a fact issue to be determined by the jury.

III. DISCUSSION

A. Summary Judgment Standard

Under Rule 56(b) of the Federal Rules of Civil Procedure, "a party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim." Fed. R. Civ. P. 56(b)(2008). Furthermore, "[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party seeking summary judgment bears the burden of showing that there is no disputed issue of material fact. Id. at 323. If the opposing party fails to make a showing that supports the existence of an element essential to the case on which it has the burden of proof at trial, summary judgment must be granted. Id. at 332-33.

> [W]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleadings; rather, its response must–by affidavits or as otherwise provided in this rule–set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed. R. Civ. P. 56(e)(2).

B. Statute of Limitations

Defendant asks this Court to dismiss all of Plaintiff's claims because she filed this action more than two years after she knew or suspected her alleged injuries were caused by Baycol. Plaintiff urges this Court to rule that whether a claim is in fact barred by the statute of limitations is a question for the jury, and should therefore not be disposed of on summary judgment. See Gaither v. City Hosp., Inc., 487, S.E. 2d 901, 903 (W. Va. 1997) (finding "under Medical Professional Liability Act, limitations period begins once patient is aware, or should reasonably have become aware, that medical treatment by particular party caused injury.")

The applicable statute of limitations provides: "[e]very personal action for which no limitation is otherwise prescribed shall be brought . . . within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries." West Virginia Code § 55-2-12. West Virginia also follows the discovery rule. Goodwin v. Bayer Corp., 624 S.E.2d 562, 567 (W. Va. 2006). This rule recognizes "there are instances when the tolling of the statute of limitations becomes a question of fact, such as when the plaintiff may not be aware of his or her injury or may not be aware of the cause of a known injury." Id. Thus, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable due diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury. Id. (citing Hickman v. Grover, 358 S.E. 2d 820 (W. Va. 1987).)

Defendant argues the statute of limitations began to run for the Plaintiff by June 22, 2001. Plaintiff started taking Baycol in April 2001 and that four or five weeks into taking Baycol, she began "losing [her] balance and falling." (Plaintiff Dep. (Def.'s Ex. D) 7:7-14.) Plaintiff then testified that she "knew something was wrong, because [she] couldn't drive [her]self to the doctor's or anyplace else." (Id.) Around the same time, Plaintiff admitted that "her husband was reading the paper and saw an article that had to do with the Baycol situation in Europe." (Id. at 8:10-18.) According to Plaintiff, the newspaper article reported, "about a hundred people had died in Europe." (Id. at 160:7-10.) Plaintiff testified, "I remember [my husband] reading that to me. I don't know if it said it was a defective drug, but at the time that's what they said and that

Bayer was not very, I don't remember exactly what the wording, but something was not being disclosed in this country. And that's when the telephone call came through from the doctor." (Id. at 160:9-17.)

On or around June 22, 2001, Dr. Steele contacted Plaintiff through her husband and advised her to stop taking Baycol immediately. (Id. at 8:14-19.) Dr. Steele believed he more than likely advised that Plaintiff was having an adverse reaction to Baycol, as this was indicated in his notes. (Steele Dep. (Def.'s Ex. B) 100:21-101:10.) Plaintiff testified that she does not recall that her husband told her why she was to stop taking Baycol. (Plaintiff Dep. (Def. Ex. D) at 8:14-19.) She further testified that she did not ask any follow-up questions of Dr. Steele as she switched doctors. (Id. at 8:23-9:5.) Similarly, Plaintiff's husband, who spoke with Dr. Steele on June 22, 2001, testified that he does not recall that Dr. Steele elaborated on why Plaintiff had to stop taking Baycol. (Jack Ballard Dep. (P.'s Ex. 3) at 32:6-9.)

Defendants argue that based upon Dr. Steele's testimony, Plaintiff knew or should have known that her injuries were related to Baycol as of June 22, 2001. In response Plaintiff argues she was only made aware that Baycol was a defective product when it was recalled on August 8, 2001. Moreover, Plaintiff asserts that her knowledge about Baycol as the cause of her injuries was "clouded" by Dr. Steele's contention that her pain was caused by her diabetic neuropathy. Therefore, Plaintiff contends there are questions of fact as to when she knew or should have known that Baycol may have caused her injuries.

The Court agrees. As the above discussion of Plaintiff's medical history demonstrates, there is a fact dispute as to whether Plaintiff's husband relayed Dr. Steele's comments to her on June 22, 2001, when she was told to stop Baycol immediately. In addition, when she saw Dr. Steele on June 21, 2001, there was no mention of Baycol related issues. In fact, on that date, Dr. Steele related Plaintiff's leg pains as "Probably secondary to diabetic peripheral neuropathy." (Steele Dep. (Def. Ex. B) at 94:2-6.) Similarly, her complaints of dizziness were attributed to her eye surgery. (Id. at 94:15-20.) The Court thus finds that a reasonable jury could find that Plaintiff's cause of action did not accrue until August 8, 2001. Accordingly, the Court will not dismiss Plaintiff's claims on statute of limitation grounds.

C. Medical Causation

Under West Virginia law, "[a]n essential element of plaintiffs' claims is proof that defendant's [drug] caused plaintiffs' injuries, and proof of causation must be by expert testimony." Rohrbough v. Wyeth Labs., Inc., 916 F.2d 970, 972 (4th Cir. 1990); see also Hicks v. Chevy, 358 S.E. 2d 202, 205 (W. Va. 1987); In re Baycol Prods. Litig., 321 F. Supp. 2d 1118, 1124-26 (D. Minn. 2004) (finding plaintiff must prove "injury and a causal connection between the claimed injury and the event sued upon" through expert medical testimony).

Defendant challenges Plaintiff's offered expert, Dr. Gregory W. Rutecki, as inadmissible under Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In Daubert the Supreme Court set forth the standard for the admission of scientific expert testimony. 509 U.S. 579 (1993). The Court then provided some general observations for the lower courts to consider in making determinations as to whether the scientific knowledge is relevant and reliable, such as whether it has been tested, subjected to peer review and publication, what is the known or potential rate of error, and whether it is generally accepted. Id. at 593-595.

In Kumho Tire Company, Ltd. v. Carmichael, the Court extended the Daubert reasoning to non-scientist experts stating:

> We conclude that Daubert's general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, establishes a standard of evidentiary reliability. It requires a valid . . . connection to the pertinent inquiry as a precondition to

> admissibility . . . And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has a 'reliable basis in the knowledge and experience of the [relevant] discipline.'

526 U.S. 137, 149 (1999) (quoting Daubert, 509 U.S. at 590-592) (citations omitted).

The Supreme Court, in addressing the reliability factor, held that "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). Applying the principles of Daubert, the Eighth Circuit held that generally:

> [T]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."

Bonner v. ISP Tech, Inc., 259 F. 3d 924, 929-930 (8th Cir. 2001) (citing Hose v. Chicago Nw. Transp. Co., 70 F. 3d 968, 974 (8th Cir. 1996).) "Although it is common that medical experts often disagree on diagnosis and causation, questions of conflicting evidence must be

left for the jury's determination." Hose, 70 F. 3d at 976.

One way to satisfy the requirements of Fed. R. Evid. 702 and Daubert is through a properly conducted medical differential diagnosis.

> In performing a differential diagnosis, a physician begins by 'ruling in' all scientifically plausible causes of plaintiff's injury. The physician then 'rules out' the least plausible causes of injury until the most likely cause remains. The final result of a differential diagnosis is the expert's conclusion that a defendant's product caused (or did not cause) the plaintiff's injury.

Glastetter v. Novartis Pharm. Corp., 252 F. 3d 986, 988 (8th Cir. 2001) (citing Westberry v. Gislaved Gummi AB, 178 F. 3d 257, 262-66 (4th Cir. 1999).)

The importance of performing a differential diagnosis is also apparent from prior Baycol proceedings. Referencing one specific Baycol plaintiff, this Court held, "whether Baycol causes such injuries [left arm pain, blurred vision, leg pain, slight cataracts in both eyes, and a torn rotator cuff], is beyond the understanding and experience of a lay person, and will require a differential diagnosis." In re Baycol Prod. Litig., 321 F. Supp. 2d at 1126.

In support of her claims, Plaintiff offers the case-specific expert testimony of Dr. Gregory W. Rutecki. Dr. Rutecki is board certified in internal medicine and nephrology, and has been a practicing physician since 1980. Currently, Dr. Rutecki treats patients

approximately one week per month for primary care concerns. In addition to his patient care, Dr. Rutecki has also authored book chapters on rhabdomyolysis contained in a book entitled "E Medicine." In his own practice, Dr. Rutecki has prescribed other statins including atorvastatin, simvastatin, and Lescol.

In drafting his expert report in this matter, Dr. Rutecki reviewed medical records provided by Plaintiff's counsel, but he did not examine or speak with the Plaintiff. Dr. Rutecki also reviewed the deposition testimony of Drs. Steele and Von Dohlen. At his deposition, Dr. Rutecki testified that he also relied on his medical training and experience in formulating his opinions. Dr. Rutecki testified he conducted a differential diagnosis in preparing his opinion – that is he took into consideration "other causes for muscle injury." (Rutecki Dep. (Def.'s Ex. E) at 86:2-3.)

Dr. Rutecki does not opine Plaintiff has a permanent injury as a result of taking Baycol. Rather, in his opinion, Plaintiff experienced Baycol-related myositis, muscle weakness and pain which resolved by August 2, 2001. (Id. at 62:24; 63:1-6.) Dr. Rutecki indicated all of his opinions provided throughout his deposition were given "with a reasonable degree of medical probability or certainty." (Rutecki Dep. (Pl.'s Ex. 9) at 89:3-6.)

Defendant argues that expert testimony on medical causation is inadmissible under Daubert and cannot create a disputed factual issue if the expert is unable to rule out other possible causes of the plaintiff's claimed ailment. See Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 758 (8th Cir. 2006) (noting an expert who failed to "exclude confounding factors

'leaves open the possibility of competing causes of the disease' and raises questions about the competency of expert testimony").

Plaintiff argues that this Court should find Dr. Rutecki's opinions reliable because he considered Plaintiff's medical history before rendering his opinion on causation. Moreover, Dr. Rutecki did consider other possible causes of muscle injury in rendering his opinion that Plaintiff's muscle injuries are Baycol-related. Plaintiff contends the law does not require that an expert rule out every cause of an injury, but only to testify that the defective product was a proximate cause of the plaintiff's injury. In support, Plaintiff cites to two decisions from West Virginia, Everly v. Columbia Gas of W. Va., Inc., 301 S.E. 2d 165 (W. Va. 1983) and Yates v. Mancari, 168 S.E. 2d 746 (W. Va. 1969). Neither case is on point, however, as they address the defense of contributory negligence, not the admissibility of expert testimony.

In this case, Dr. Rutecki has failed to conduct a medically-reliable differential diagnosis which would satisfy Rule 702 and Daubert. While Dr. Rutecki claims to have conducted a differential diagnosis, he testified that he was unable to rule out diabetic neuropathy and osteoporosis as possible causes of Plaintiff's complaints:

Q: Could diabetic neuropathy be a cause of the pains that [Plaintiff] complained of on June 21st of 2001?

A: That's possible.

Q: Have you ruled out diabetic neuropathy as the cause of the complaints that [Plaintiff] made to Dr. Steele on June 21st of 2001?

A: No, I have not.

Q: And could the complaints of pain that [Plaintiff] made on June 21st, 2001 have been related to osteoporosis?

A: That's possible.

Q: Have you ruled out osteoporosis as a cause of the complaints of pain that [Plaintiff] made on June 21st, 2001?

A: I have not.

(Rutecki Dep. (Def.'s Ex. E) at 65:5-21.)

As Dr. Rutecki is unable to rule out alternative explanations for Plaintiff's complaints, the Court finds his opinion that Plaintiff's alleged muscle pains were caused by Baycol is speculative and unreliable, and therefore, inadmissible. See Fed. R. Evid. 702; Marmo, 457 F. 3d at 758; Turner v. Iowa Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000) (physician testimony properly excluded after he "admitted that he made no attempt to consider all the possible causes, or to exclude each potential cause until only one remained, or to consider which of two or more non-excludable causes was the more likely to have caused the condition.")

Without expert testimony, Plaintiff cannot meet her burden of proof of demonstrating a genuine issue

of material fact on the question of medical causation. Accordingly, summary judgment in favor of the Defendant is appropriate.

D. West Virginia Consumer Credit and Protection Act

Under the West Virginia Consumer Credit and Protection Act ("the Act"):

> Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action . . . to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary and proper.

W. Va. Code § 46A-6-106(a).

For consumers to make out a prima facie case under the Act, they are not required to allege a specific amount of actual damages. If the consumer proves that he or she has purchased an item that is "different from or inferior to that for which he bargained," the ascertainable loss requirement is satisfied. In re W. Va. Rezulin Litig., 585 S.E. 2d 52, 75 (W. Va. 2003). In

addition, the consumer must show reliance on a violation of the Act.[1]

Plaintiff responds that to prevail on her consumer protection claim, she need not show reliance. In support, she cites to In re Rezulin, a decision issued by the West Virginia Supreme Court. What was at issue in that decision, however, was whether a plaintiff had to allege a specific amount of damages. See, 585 S.E.2d at 75. There is no discussion in the Rezulin opinion that eliminates the reliance requirement. In fact, the Act specifically provides for a right of action for those who suffer loss "as a result of" a violation of the Act, such as a false advertisement. See, W. Va. Code § 46A-6-106(a).

The evidence demonstrates that Baycol was indeed effective in lowering Plaintiff's cholesterol. (Plaintiff Dep. (Def.'s Ex. D) at 86:9-14; 88:19-20; Rutecki Dep. (Def.'s Ex. E) at 45:5-7 ("Q: Was Baycol effective in reducing Mrs. Ballard's cholesterol levels? A: Yes, it

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[1] Relevant to this case, violations of the Act include "the act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby; [and] . . . advertising, printing, displaying, publishing, distributing or broadcasting, or causing to be advertised, printed, displayed, published, distributed or broadcast in any manner, any statement or representation with regard to the sale of goods . . . which is false, misleading or deceptive or which omits to state material information which is necessary to make the statements therein not false, misleading or deceptive." W.Va. Code § 46A-6-102(7) (M) and (N).

was.").) Even if Baycol was not effective for Plaintiff, there is no evidence in the record that she saw or relied on any advertising or other communications from Defendant when deciding to take Baycol. (Ballard Dep. (Def.'s Ex. D) at 102:17-19; 159:10-16 ("Q: Had you ever heard of Baycol before Dr. Steele prescribed it for you? A: I had not . . . Q: I'm saying you will agree with me that there is nothing that Bayer has shown you or said to you that played into your decision to take Baycol? Is that right? A: You're right in assuming. But how could Bayer tell me anything? I have never been in touch with Bayer."). Accordingly, the Court finds that Defendant's Motion for Summary Judgment with respect to Plaintiff's unfair competition, fraud, and consumer protection act claims is appropriate.

E. Intentional Infliction of Emotional Distress (IIED)

"Intentional or reckless infliction of emotional distress, [IIED], also called the 'tort of outrage,' is recognized in West Virginia as a separate cause of action." Travis v. Alcon Labs., Inc., 504 S.E. 2d 419, 425 (W. Va. 1998) (citation omitted).

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Harless v. First Nat'l Bank in Fairmont, 289 S.E. 2d 692, 693 (W. Va. 1982); see also Restatement of Torts (Second) § 46(1) (1965).

In West Virginia the elements of IIED can be summarized as:

> (1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Hines v. Hills Department Stores, Inc., 454 S.E.2d 385, 392 (W. Va. 1994) (per curiam).

Plaintiff has presented no evidence which would permit a reasonable jury to conclude that Defendant engaged in conduct which is atrocious or utterly intolerable in a civilized community. Nor has Plaintiff demonstrated any action by the Defendant which could be characterized as so extreme and outrageous as to exceed all possible bounds of decency. Moreover, the Court concludes based on the lack of evidence on this claim that no reasonable jury could conclude that Defendant caused Plaintiff to suffer any emotional distress. As a result, this Court finds Defendant is entitled to summary judgment on Plaintiff's IIED claim.

E. Medical Monitoring

Plaintiff has agreed not to pursue her medical monitoring claim. (Pl.'s Mem. 15). As a result, Defendant's Motion for Summary Judgment with

respect to Plaintiff's claim for medical monitoring damages is granted.

Accordingly, based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

> Defendant's Motion for Summary Judgment [Docket No. 4] is **GRANTED**. This matter is **DISMISSED WITH PREJUDICE.**
>
> **LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: October 23, 2008

s/ Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431 (MJD)
Case No. 02-0199

[Dated June 13, 2006]

In Re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Michael Black, et al. v. Bayer Corp., et al.	)

The deposition of DR. W. MICHAEL SKEENS was taken on the 13th day of June, 2006, commencing at 4:01 p.m., at the Law Offices of Farrell, Farrell & Farrell, 914 Fifth Avenue, Huntington, West Virginia, before Alex Koutsunis, a Court Reporter and Notary Public in and for the State of West Virginia, pursuant to notice in the above-styled matter which is now pending and undetermined in said Court.

DISK ENCLOSED

ALEX KOUTSUNIS, Court Reporter
P. O. Box 2043, Huntington, WV 25720 - (304) 523-4300

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I N D E X

WITNESS:	EXAMINATION:	
DR. W. MICHAEL SKEENS	Mr. Schoon	4, 95
	Mr. Yianne	87

EXHIBITS:

Exhibit Number 1	Page	10
Exhibit Number 2	Page	72
Exhibit Number 3	Page	72
Reporter's Certificate	Pages	99-100
Verification of Deponent	Pages	101-102

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(Witness Sworn)

THEREUPON CAME,

DR. W. MICHAEL SKEENS,

called as a witness by the Defendant, Bayer Corporation, herein, who, having been first duly sworn according to law, testified as follows:

EXAMINATION

BY MR. SCHOON:

Q Dr. Skeens, my name is Gene Schoon, and I represent Bayer Corporation and Bayer AG, two of the defendants in this case, and we are here to take your deposition today. What I would like you to do is just to start off, if you could give us your full name and your office address, for the record.

A William Michael Skeens. The address is 1542 Spring Valley Drive, Huntington, West Virginia, 25704.

Q And you go by Michael Skeens?

A Mike.

Q Mike? Okay. Doctor, let me give you just a brief explanation of the deposition today. First of all, I want to tell you what this case is about. This

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case is about a pharmaceutical drug that my client, Bayer, manufactured, and that was prescribed to Mr. McCollins, who is the plaintiff in this case.

And you are not a party to this case, you are not a defendant to this case, and I'm sure I speak for everybody here in saying that nobody is going to question or second guess any of your clinical judgments in connection with this matter.

Mr. McCollins is not suing for any personal injuries or bodily injuries in this case. He's not claiming any physical injury or claiming compensation for that. Instead, this is about economic loss that relates to the drug, Baycol. Okay? Are you with me so far?

A Okay.

Q And he is suing on behalf of himself and on behalf of a class of West Virginia residents to recover what he claims is economic loss related to the drug, Baycol. Now, we disagree with Mr. McCollins, and we believe that Baycol was a good drug and that it benefitted him and it benefitted many other people who took it in West Virginia and elsewhere in the United States. And we do not believe that this case should be

* * *

[p.74]

A Yes, sir.

Q I think you told me a minute ago that you had prescribed Baycol to other patients. I don't want to go into the medical history of any other patient, but in general as of this time and through the point at which the drug was withdrawn in August of 2001, what had your experience been with Baycol?

A Tolerability was fine. I hadn't seen any cases of really any kind of myositis or myalgia issues with it.

Q Was it effective in lowering cholesterol?

A Yes.

Q And if you needed to determine whether any patient experienced any problems with Baycol, you would actually need to go back and look at the records?

A Yes, sir.

Q Similarly, if a patient of yours had any problems -- here we've got an economic problem -- but if a patient had a problem on Pravachol or Zocor or one of the other statins and you switched them to Baycol, you would also need to review the individual chart to tell me about that?

A Yes, sir.

[p.75]

Q Now, was it your professional medical judgment to prescribe Baycol for Mr. McCollins?

A Yes.

Q And in making that decision did you rely on any sales materials as opposed to your professional medical judgment?

A No.

Q Do you remember ever meeting with any sales representatives of Bayer or GlaxoSmithKline to discuss Baycol?

A Yes, Bayer representatives.

Q Do you have any particular recollection of what they advised you?

A Nothing specific, no.

Q Do you feel that the representatives of Bayer that you met with to talk about Baycol ever misled you as to the safety or efficacy of Bayer -- of Baycol?

A No, no.

Q Let's take a look at the labs. The next labs I have are on page 163. This was a visit of February 1, 2001.

A Okay.

Q The labs on page 163 appear to be from a

[p.76]

draw date on April 10, 2001, about two months later?

A That's correct.

MR. YIANNE: What was the date of that record?

MR. SCHOON: April 10th, 2001.

MR. YIANNE: Okay.

MR. SCHOON: It's at page 163.

MR. YIANNE: Okay.

BY MR. SCHOON:

Q So Mr. McCollins would have been on Baycol for approximately two months by this time, correct?

A Probably not quite two months, because he was going to finish the supply of Zocor he had, and then would be one week with no medication prior to starting Baycol. So at the time of that lab, he should have been on it about a month.

Q Okay. And how was his LDL on Baycol?

A LDL was 112.

Q Is that within your goal?

A Absolutely.

Q Wasn't that one of the better LDLs that he had?

A Yes, it is.

[p. 77]

Q And how was his total cholesterol?

A Total cholesterol was 190.

Q That's within goal?

A Yes.

Q What is the HDL/cholesterol ratio?

A That is one way of looking at the breakdown. Basically, it comes down more importantly to low HDL puts you at higher risk, and higher LDL puts you at higher risk. So I tend to more typically use those two numbers themselves rather than a ratio between them.

Q I see.

A The ratio of HDL to cholesterol, there were some studies came out where they were using that ratio as a predictor for cardiovascular risk, but it never -- the national guidelines never really picked that up.

Q As far as you were concerned, Mr. McCollins was doing fine on Baycol at this point?

A It was perfect for him.

Q So Baycol helped Mr. McCollins?

A Yes.

Q Let's take a look -- there is a follow-up visit, I believe, to your February 1 visit, on page 25. This was a visit of June 12, 2001?

[p.78]

A Yes, that's correct.

Q So he would have been on Baycol maybe about three months by this time, from February 1 to about this time?

A Right about that. Yes, sir.

Q Giving time for him to use up his Zocor?

A Yes.

Q Okay. There is a discussion of -- under "subjective" of what Mr. McCollins advised you. Do you see that?

A Yes, sir.

Q All right. And did Mr. McCollins report to you any new problems --

A No.

Q -- that would have been related in any way to Baycol?

A No.

Q In fact, the last sentence of the "subjective" says, "No other new problems identified," correct?

A Yes, sir.

Q What was your assessment of how he was doing on Baycol as of this time, June 12, 2001?

[p.79]

A It appeared to be a good response, and really no side effect problems were identified.

Q I notice under the assessment and plan, you, of course, have hypertension and hypercholesterolemia, but also degenerative joint disease and degenerative lumbar disk disease among some other things there.

A Yes.

Q The degenerative joint disease and lumbar disk disease were pre-existing conditions?

A Yes, sir.

Q The next note I saw appears to be on the next page, page 24, and it appears to be a telephone record?

A Yes, sir.

Q July 19, 2001. And Mr. McCollins is complaining of low back pain?

A That's correct.

Q And then it looks like you saw Mr. McCollins a few days later on July 23, 2001; is that correct?

A Yes, sir.

Q Let's look at your note from that date,

[p. 80]

page number 22. What were Mr. McCollins' complaints as of that point?

A It says pain in lower back radiating around to the left testicle for five to six days. So he had seen Dr. Sharma the day before, and he was diagnosed with prostatitis and started on Macrobid.

Q Did any of these problems that he was relating to you at that point relate -- did they suggest that Baycol was involved in any way?

A Not at that point, no.

Q At any point did Mr. McCollins have any problems that you would attribute to Baycol?

A I don't believe so, but certainly not at that point.

Q Did you ever attend any seminars or dinner talks or conferences concerning Baycol, that you recall?

A It's possible, but I don't recall any.

Q The next thing that I'm aware of that relates to Baycol in Mr. McCollins' record would be a telephone message from August 9, 2001.

A That's correct.

Q Do you have that?

[p.81]

A Yes, sir.

Q Does that indicate to you that Mr. McCollins had contacted your office?

A That's correct.

Q And he was aware that Baycol had been withdrawn from the market as of that point?

A It was on the news probably the night before that, but yes.

Q And what was your advice to Mr. McCollins?

A He was advised to stop the Baycol, take a week off to allow the medication to wash out of his system completely, and then start Lipitor, 20.

Q And then to have labs done in a month?

A To have labs done in a month, right.

Q What page are you on there?

A It's page 19.

Q So it wasn't necessary for you to see Mr. McCollins for this --

A (Interrupting.) To change medication, no.

Q He did not report any problems with the Baycol as of that point?

A No.

Q When did you learn that Baycol was

* * *

[p.86]

documentation, yes.

Q Okay. Now, just to review Mr. McCollins, again, did Baycol help Mr. McCollins, in your judgment?

A Yes.

Q Did Baycol, in your judgment, injure Mr. McCollins?

A Not that I'm aware of.

Q Was Baycol safe and effective in Mr. McCollins?

A It appeared to be.

Q And are you able to say that to a reasonable degree of medical certainty?

A Yes.

Q And did Baycol help other patients of yours?

A Yes.

Q And was it safe and effective in their cases?

A Yes, it appeared to be for all of them.

MR. SCHOON: Let me just take a couple of minute break.

THE WITNESS: Okay.

(WHEREUPON, a discussion was held off the

[p.87]

record.)

MR. SCHOON: Dr. Skeens, I have no further questions for you, so I appreciate very much your time and your attention to this. I appreciate your preparation in reviewing your chart. So thank you very much.

THE WITNESS: Yes, sir.

MR. YIANNE: Actually, I had a few follow-up questions.

EXAMINATION

BY MR. YIANNE:

Q You were asked a few minutes ago as to whether Mr. McCollins suffered any injury as a result of taking Baycol, and your answer to that was no. I just want to clarify that issue a little bit. Are you talking in terms of a medical injury as opposed to economic injury?

A I'm speaking purely in terms of medical injury.

Q Okay. So as you sit here today, you're not offering any medical opinions as to whether Mr.

McCollins suffered an economic injury as a result of his use of Baycol?

[p.88]

A I'm not aware of any type of economic issue to it, but he suffered no medical side effects.

Q Okay. Well, do you know if Mr. McCollins had a co-pay for his Baycol prescription?

A I believe he did. I believe that's why we were concerned about the change in drugs earlier on his prescription plan. I believe there was a co-pay issue and tiers involved in that.

Q Okay. When he was switched from Zocor to Baycol, was that based purely on an economic factor; in other words, because of his insurance situation?

A That was the reason for the change from -- let me look back at that. The change from Zocor to Baycol was driven by the insurance benefit.

Q Okay. It wasn't because you thought Baycol was actually a more effective drug than Zocor?

A No. Zocor was doing fine.

Q And, in fact, was it Mr. McCollins who brought the issue of insurance to your attention?

A Yes, sir.

Q Are you able to conclude with medical certainty that Baycol did not cause Mr. McCollins any harm in terms of muscle aches?

[p.89]

A None that I'm aware of.

Q Okay. So in other words, to your knowledge, Mr. McCollins never reported any muscle ache to you while he was on Baycol?

A That's correct.

Q But is it a fair statement that he may have had muscle aches while on Baycol, he just didn't report those to you during that time period?

A It's certainly possible. Many people have minor aches and pains that they don't necessarily report. So, yes, it is possible.

Q Do you have any opinions as to whether Baycol was more effective than any of the other statins that you prescribed to your patients?

A It was probably as effective as most doses of Zocor and most doses of Lipitor.

Q So do you think it was more effective or maybe just as effective?

A It was just as effective.

Q Earlier you were asked some questions about meeting with pharmaceutical reps, and I think you

indicated that you maybe had met with an individual from Bayer Corporation?

* * *

EXHIBIT K

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-191(1-3)
Honorable James P. Mazzone

[Dated November 1, 2006]

KEITH SMITH, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
Bayer Corporation,	)
	)
Defendant.	)
	)

- - -

Deposition of PATSY P. CIPOLETTI, JR., M.D.

Wednesday, November 1, 2006

- - -

VOLUME II

- - -

The continuing deposition of PATSY P. CIPOLETTI, JR., M.D., called for examination by the defendant, taken pursuant to Notice and the West Virginia Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the

undersigned, Deborah A. Zagula, Registered Professional Reporter-Notary Public in and for the State of West Virginia, held in the law offices of Frankovitch, Anetakis, Colantonio & Simon, 337 Penco Road, Weirton, West Virginia 26062, commencing at 2:18 o'clock a.m., on the day and date above set forth.

- - -

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Post Office Box 2029
Weirton, West Virginia 26062
(304) 723-0001

* * *

[p.3]

P R O C E E D I N G S

- - - - - - - - - - - - -

(2:18 o'clock p.m.)

- - -

PATSY P. CIPOLETTI, JR., M.D.,

called for examination by the plaintiffs, having been first duly sworn, as hereinafter certified, was deposed and said as follows:

EXAMINATION

BY MR. SCHOON:

Q Doctor, again this is just a continuation of the deposition that we started I think it was about two weeks ago when we were here last --

A October 20th.

Q Right. Same rules apply. If at any time you need to look at something, I know you've got your chart with you today, feel free to do so. If you think that there's something else that we might have that would be helpful for you, let us know. If we have it, you know, we'll be glad to help, because what we're interested in is just getting a complete record here if we can.

A I understand.

Q Now, today I want to talk about your patient Kevin Smith, who's also a plaintiff --

A Keith Smith.

* * *

[p.12]

effect. You know, a lot of people, like I'll give people samples -- this is a generalization, but I'll give people samples and they'll read the package insert. Well, they'll read some little small, minute part of that package insert that says that 21 percent of the patients get a headache, they'll call me the next day and they have a headache. I mean, that may or may

not be caused by the medication, but it's real to them, so they stop it.

Q I'm going to go back to the question that I sort of led off with here, and that is did you ever determine that Mr. Smith's complaints of dizziness and nausea that he reported to you in May of 2001 were related in any way to Baycol?

A On May 15, 2001 he stopped the Baycol because he felt that it may have caused dizziness and nausea. Now, on that visit he didn't say those symptoms were continuing, so I can't say with absolute certainty whether the Baycol caused nausea and dizziness. All I can say is when he stopped it that those symptoms apparently went away.

Q Is dizziness and nausea a common side effect from statin therapy, in your experience?

A No.

Q So if I understand what you're saying correctly, you never made a determination one way or another whether

[p.13]

Mr. Smith's reports of dizziness and nausea were actually related to Baycol. All you can say is that he experienced or he reported nauseousness and dizziness, and then 10 days later when you saw him he didn't have it?

A Well, you know, he started on the Baycol March 13, 2000. And according to my information he was taking

that every day. But the complaint of nausea and dizziness was on May 4th, 2001. So that's over a year that he was on the Baycol. So I think if the Baycol was going to cause nausea and dizziness it probably would have done it in maybe the first few weeks of therapy, if that was going to cause nausea and dizziness. Most side effect from most medications are going to happen in the first two weeks.

I didn't really press the issue with him at that time because first of all that was his perception, and number two, I have other choices.

Q Well, it sounds like he had already made his decision without your input that he was going to stop this drug?

A Right.

Q And your other choices were Lipitor or some other --

A Pravachol, Zocor. There's lots of other choices.

Q And I think you told us last time that for you it's important to have those choices because sometimes in fact your patients can tolerate one statin and maybe can't

* * *

[p.38]

A Yes.

Q And then what was the rest of the plan?

A I wanted him to get lab work in six weeks. And he did. He got his lab work on August 8th, 2000 and everything was good.

Q Before you get there, on June 29, 2000 did you discuss with Mr. Smith precautions with use of Baycol?

A It says -- yeah, as far as the subjective, I did discuss the precautions with use of Baycol.

Q So would that have been the same precautions that you had discussed with him three months earlier?

A Probably discussed the muscle problems and also liver problems.

Q So for Mr. Smith, you had two discussions with him about the risks and benefits of -- well, the precautions or the risks associated with Baycol use, correct?

A Yes.

Q Now we can go ahead. You said -- well, before we do that, do you remember anything about this visit on June 29, 2000 other than what we have discussed so far?

A No.

Q Did you get a lab report following this June 29, 2000 visit when you gave him the 84 samples of Baycol?

A Yes.

Q And what did that show? First give me the date of

[p.39]

the lab report.

A It was August the 8th of 2000.

Q And for the record that should be PC000110.

A His cholesterol come down to 179, his HDL was 38 and his LDL was down to 118, and his liver enzymes and everything else looked good.

Q Did this indicate to you whether the Baycol was working?

A Oh, it's a very good result with the Baycol.

Q And was this result consistent with results that you had had with other patients as to its effectiveness?

A Yes. I think as I have stated before in previous depositions, I probably wasn't a big Baycol writer because there was a lot of choices and, you know, at that point in time I didn't favor so many over other statins, as I stated previously. But the experience I did have with Baycol and the patients that I did have on Baycol -- and I have no recollection of how many patients I had on Baycol, but my experience was very positive with Baycol as far as reduction in LDL levels.

Q What were your instructions to Mr. Smith on August 18 -- I gather you didn't actually see him that day, right?

A No.

Q But what were your instructions to him?

* * *

EXHIBIT L

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-191(1-3)
Honorable James P. Mazzone

[Dated October 20, 2006]

KEITH SMITH, et al.,

Plaintiffs,

vs.

Bayer Corporation,

Defendant.

- - -

Deposition of PATSY P. CIPOLETTI, JR., M.D.

Friday, October 20, 2006

- - -

VOLUME I

- - -

The deposition of PATSY P. CIPOLETTI, JR., M.D., called for examination by the defendant, taken pursuant to Notice and the West Virginia Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Deborah A. Zagula,

Registered Professional Reporter-Notary Public in and for the State of West Virginia, held in the law offices of Frankovitch, Anetakis, Colantonio & Simon, 337 Penco Road, Weirton, West Virginia 26062, commencing at 9:10 o'clock a.m., on the day and date above set forth.

- - -

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* * *

[p.4]

P R O C E E D I N G S

- - - - - - - - - - - - -

(9:10 o'clock a.m.)

- - -

PATSY P. CIPOLETTI, JR., M.D.,

called for examination by the defendant, having been first duly sworn, as hereinafter certified, was deposed and said as follows:

EXAMINATION

BY MR. SCHOON:

Q Doctor, I introduced myself a few minutes ago when we were off the record. My name's Gene Schoon, and I

represent Bayer Corporation along with my co-counsel here, Erik Legg, and we appreciate you coming up here for your deposition today. Have you ever testified before?

A Yes.

Q About how many times?

A Depositions, court time, I'm probably saying over 30, 40 cases.

Q So you're familiar with the process. If you need me to go over anything with you just let me know, but I'm going to assume that you're familiar with the process and if you need any information from me you'll just stop me and ask or ask Mr. Simon. Okay?

A Okay.

* * *

[p.16]

Q And that was true for all the statins, correct?

A Yes.

Q And let's talk about efficacy. For each of your patients did you always prescribe the same dose?

A No.

Q Was the choice of dose also an individualized decision?

A Yes.

Q And also on efficacy, in your experience did some patients respond better to one statin than they did to another?

A Yes.

Q Were there some patients that you had in your experience where they didn't respond well at all to one statin, but then responded quite well to another?

A Yes.

Q Is it important -- was it important for you then and is it important for you now to have a choice of statins to prescribe to your patients?

A Yes.

Q Could you explain why that's important?

A Because of the side effect profile. Some people will develop side effects such as muscle cramps or fatigue or GI upset with Zocor, when they maybe might not experience that with Lipitor. And some patient might

* * *

[p.68]

Q Well, the recommended starting dose was .4 milligrams. Was that consistent with your understanding?

A You know, I don't recall at that time what the recommended starting dose was, but she was started on .4.

Q Now, why did you choose to start her on Baycol as opposed to one of the other statins? Obviously she had a problem with Pravachol, so you weren't gonna put her back on that if you didn't have to, right?

A You know, she wasn't the only person that I started on Baycol at that time. Actually, the thing I remember about Baycol up until the time it was pulled from the market, I had good results with Baycol overall in lowering cholesterol, and I had low complaint -- I had a low amount of complaints from patients about Baycol. So, you know, I think physicians tend to follow the path of least resistance. So, you know, if you have a drug that seems to work and doesn't have many problems associated with it, I'm going to use that drug or another one like it, as opposed to -- you know, I had very few complaints about Baycol at that time, that I can recall.

Q Was Baycol the only statin you were prescribing at that time?

A Oh, no, no. I mean up to that point you're probably dealing with Pravachol and Zocor, Lovastatin --

Q Lipitor.

[p.69]

A Lipitor. I'm not sure if Lescol was out there or not.

Q Do you recall whether Baycol was more or less expensive than the other statins?

A I don't recall.

Q If a statin is less expensive is that also advantageous for a patient?

A Yes.

Q Did you have samples at that time of statins other than Baycol available to you?

A Most likely. The other issue today probably more than 2001 is formulary coverage, but at that time I'm not sure how restrictive the formulary coverage was for statins, but today it's a major issue as far as choice of drugs.

Q You told us a minute ago that you had good results with Baycol with other patients. Did Baycol work for Mrs. Sperlazza in lowering her cholesterol, particularly her LDL? I can refer you to her labs on June 19, 2001, if you'd like to see.

A Yes. On June 19 she had a cholesterol of 164 and triglycerides 123, and liver enzymes were normal.

Q So her cholesterol had dropped by, what is that, 50 percent or more from a prior lab when it was 275?

A Whatever 164 divided by 275 is. You know, on the

* * *

EXHIBIT M

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-191(1-3)
Honorable James P. Mazzone

[Dated October 3, 2006]

KEITH SMITH, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
Bayer Corporation,	)
	)
Defendant.	)
	)

- - -

Deposition of SHIRLEY A. SPERLAZZA

Tuesday, October 3, 2006

- - -

The deposition of SHIRLEY A. SPERLAZZA, one of the plaintiffs herein, called for examination by the defendant, taken to Notice and the West Virginia Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Deborah A. Zagula, Registered Professional Reporter-Notary Public in and for the State of West Virginia,

held in the law offices of Frankovitch, Anetakis, Colantonio & Simon, 337 Penco Road, Weirton, West Virginia 26062, commencing at 9:07 o'clock a.m., on the day and date above set forth.

- - -

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Post Office Box 2029
Weirton, West Virginia 26062
(304) 723-0001

* * *

[p.3]

PROCEEDINGS

- - - - - - - - - - - - -

(9:07 o'clock a.m.)

- - -

SHIRLEY A. SPERLAZZA,

one of the plaintiffs herein, called for examination by the defendant, having been first duly sworn, as hereinafter certified, was deposed and said as follows:

EXAMINATION

BY MR. LEGG:

Q Good morning, Mrs. Sperlazza.

A Good morning.

Q We met briefly off the record. My name's Erik Legg, and I'm with the firm of Farrell, Farrell & Farrell in Huntington, West Virginia representing Bayer Corporation in this matter. To my left is Mr. Gene Schoon, who's also representing Bayer, and he is with the firm Sidley Austin in Chicago.

Have you ever had your deposition taken before?

A No.

Q I'm sure that your attorney has given you some idea of what we're going to do today, but let's just take a few minutes to talk about the ground rules.

You are under oath, and I'm going to be asking you some questions, and hopefully you're going to be giving me

* * *

[p.73]

prescribed?

A Yes, sir.

Q You took it every day?

A Yes, sir.

Q Do you know what your cholesterol levels were -- and I'm not necessarily asking you to be specific to a number. If you know a number that's great. But do you

know what your cholesterol levels were during the time you were on Baycol?

A When I was on them it did lower it, but I don't know what it lowered it to.

Q Did Dr. Cipoletti ever tell you one way or another whether Baycol was effective for your cholesterol?

A I just know when he called me after they did the blood work he said my cholesterol was down, that's all.

Q Do you know whether your cholesterol levels increased again after you stopped taking Baycol?

A I believe they went up.

Q So it's your understanding that Baycol did lower your cholesterol?

A Yes, sir.

Q It's been an hour since the last five minute break we took. We can take another break or just keep going.

A I'm fine.

Q Did you pay money out of your own pocket for Baycol?

* * *

Exhibit N

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-191 (1-3) JPM
Honorable James P. Mazzone

[Filed October 30, 2008]

KEITH SMITH, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BAYER CORPORATION,	)
	)
Defendant.	)
	)

BAYER CORPORATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS ACTION

The pending motion for class certification is a thirteenth hour attempt to relitigate issues already decided against plaintiffs. This Court should deny certification based on collateral estoppel or, in the alternative, because plaintiffs' putative economic loss class does not meet the requirements for class certification under West Virginia law.

The Baycol product liability litigation started more than seven years ago and has involved the claims of more than 50,000 plaintiffs. Today, fewer than 400

plaintiffs have claims pending. Throughout this litigation, Chief Judge Michael Davis of the United States District Court for the District of Minnesota has presided over all of the federal Baycol cases. Judge Davis already has denied certification of a West Virginia economic loss class. West Virginia counsel fully and vigorously litigated that issue – and lost. *See* Memorandum of Law and Order Granting Bayer's Cross-Motion Opposing Class Certification, *McCollins v. Bayer Corp.*, No. 02-0199 ("*McCollins* Order") (D. Minn. Aug. 25, 2008) (Ex. A1) at 7-14. The decision denying class certification is a final judgment that binds plaintiffs here and collaterally estops them from again seeking certification of a West Virginia economic loss class. *See infra,* Part I.

Even if the issue had not already been decided, the record demonstrates that plaintiffs' proposed economic loss class should not be certified. Plaintiffs contend that common issues – those susceptible to classwide proof – predominate. But plaintiffs cannot prove their cases without plaintiff-specific evidence for each absent class member. Plaintiffs' statutory consumer fraud claim requires individual proof that each putative class member was injured by or did not benefit from Baycol and that this purported injury was caused by a misrepresentation by Bayer. *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 75 (W. Va. 2003); *Jones v. Purdue Pharma L.P.*, No. 5:01-1246, 2002 WL 32097528, *2 (S.D.W. Va. Feb. 27, 2002) (Ex. A33). Plaintiffs' other claims also require proof of causation and, in some instances, reliance – inherently individual issues. Moreover, plaintiffs' contention that punitive damages are a common issue that can be tried on a classwide basis conflicts with United States Supreme Court precedent. *See State Farm Mut. Auto.*

Ins. Co. v. Campbell, 538 U.S. 408 (2003). Because plaintiffs cannot show that common issues predominate, class certification should be denied. *See infra*, Part II.A.

Nor can plaintiffs carry their burden of establishing the superiority of class litigation. Because plaintiffs' claims present so many individual issues, plaintiff-by-plaintiff trials still would be necessary, even if a class were certified. Another state court faced with the prospect of such follow-on trials recently ***decertified*** a Baycol class, holding that class litigation was not superior because, at this late date in the Baycol litigation, individual absent class members would be unlikely to come forward after a class trial to prove their claims. *See infra*, Part II.B.

Finally, plaintiffs cannot establish adequacy. Indeed, there are so many plaintiffs with differently situated claims and potentially conflicting interests that certification would violate due process. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). *See infra*, Part II.C. For all these reasons, plaintiffs' motion for class certification should be denied.

BACKGROUND

A. Baycol Licensure and Withdrawal

The drug cerivastatin, marketed in the United States as Baycol, is a member of a class of cholesterol-reducing prescription medicines called statins. Statins are highly successful in lowering the lipid levels of persons with high cholesterol. High cholesterol, if left untreated, can lead to heart attack, stroke and death. *See* Package Inserts for Baycol (Group Ex. A10).

From 1997 to August 8, 2001, Bayer processed and distributed Baycol pursuant to licensure by the United States Food and Drug Administration ("FDA"). Baycol was first approved in 0.2 mg and 0.3 mg doses. *See* June 26, 1997 FDA New Drug Application ("NDA") Approval Letter (Ex. A11). In May 1999, FDA approved a 0.4 mg dose. *See* May 24, 1999 FDA NDA Approval Letter (Ex. A12). A 0.8 mg dose was approved in July 2000. *See* July 21, 2000 FDA NDA Approval Letter (Ex. A13). Bayer distributed all four doses until August 8, 2001. *See* Aug. 8, 2001 "Dear Health Care Professional" Letter (Ex. A14).

From Baycol's first release, every label and package insert contained an FDA-approved warning regarding the risk of rhabdomyolysis ("rhabdo"), a condition resulting in the breakdown of muscle fibers and skeletal muscle tissue, and the risk of using another class of lipid-lowering drugs, fibrates, concurrently with Baycol. *See* Baycol Package Inserts (Group Ex. A10). As knowledge evolved about these risks, Bayer obtained approval from FDA to amend Baycol's labeling. The warnings became stronger and more specific over time, including a specific contraindication against prescribing Baycol together with gemfibrozil. *See id.*; *see also* Letter from FDA to Bayer, January 4, 1999 (Ex. A15); Letter from Bayer to FDA, December 3, 1999 (Ex. A16). Bayer communicated safety and efficacy information regarding Baycol to healthcare providers. *See* Healthcare Professional Communications (Group Ex. A17).

Nevertheless, Bayer continued to receive reports of rhabdo in patients when gemfibrozil, a fibrate, was prescribed as a co-medication. *See* Aug. 8, 2001 "Dear Health Care Professional" Letter (Ex. A14). Therefore,

on August 8, 2001, Bayer voluntarily decided, with the approval of FDA, to withdraw Baycol from the market. *Id.*

B. Overview of the Baycol Litigation

In the years following the highly-publicized withdrawal of Baycol, thousands of plaintiffs filed lawsuits alleging that Baycol caused an array of physical injuries and economic losses. Most of the cases were concentrated in (a) the United States District Court for the District of Minnesota, where the federal cases were consolidated in an "MDL" (multidistrict litigation); and (b) the Pennsylvania Court of Common Pleas in Philadelphia.

1. The MDL

Approximately 22,590 plaintiffs have had Baycol cases pending in federal court at one time or another over the last seven years. Today, only 36 plaintiffs have active claims, most of which are subject to pending summary judgment motions.

Case disposition. What happened to the other cases? Rhabdo cases settled, as part of Bayer's widely publicized settlement program; the claims of 39 West Virginians were resolved through this program. Thousands of plaintiffs dismissed their claims rather than respond to written discovery or provide expert reports, and the Court dismissed thousands of additional plaintiffs who failed to produce discovery. *See* MDL Pretrial Orders 4 § V.D.1, 10, 12, 81, and 85 (Group Ex. A10). No Baycol case has been tried in federal court.

Class certification decision. Plaintiffs moved for certification of nationwide economic loss, injury, and medical monitoring classes. The MDL court held that none of these classes could be certified. *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 202, 215 (D. Minn. 2003) (Ex. A5). With respect to the proposed economic loss class, which sought recovery on unjust enrichment and warranty claims, the court rejected plaintiffs' claim that they could establish liability simply by focusing on Bayer's alleged misconduct. Because the record showed that many patients benefited from taking Baycol and that "the vast majority of individuals who took Baycol suffered no injury from Baycol," the Court concluded that individual "[p]laintiffs would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any health benefits . . . . Individual issues predominate . . . ." *Id.* at 213-14.[1] The court also denied certification of a punitive damages class, holding that due process required punitive damages to be specific to "particular plaintiffs' claims," and that could not be determined in a class setting. *Id.* at 215 (relying on *State Farm v. Campbell*, 538 U.S. 408).

The* McCollins v. Bayer Corp. *ruling. A West Virginia plaintiff in the MDL continued to argue for certification of an economic loss class defined as "all persons in West Virginia who purchased the drug cerivastatin under the brand name 'Baycol' between February 1998 and August 8, 2001, or their estates, administrators or other legal representatives, heirs or

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[1] *Accord Jensen v. Bayer AG*, 2003 WL 22962431 (Cir. Ct. Cook Co., Ill., Dec. 13, 2003) (Ex. A9) (denying certification of putative nationwide medical monitoring and economic loss classes).

beneficiaries." Complaint, *McCollins v. Bayer Corp.*, No. 01-C-0725, ¶ 30 (Cir. Ct. Cabell Co., W. Va. Aug, 22, 2001) (Ex. A2).[2] Plaintiff asserted claims for breach of warranties, unjust enrichment, and violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-6-101 *et seq.* Complaint ¶¶ 40, 45, 49, and 63. Following discovery, plaintiff moved to remand the case and Bayer moved to deny class certification and grant summary judgment against the named plaintiff. The MDL court denied remand and denied class certification. The court treated plaintiff as an adequate representative of the putative class, but held that, because "plaintiffs would have to demonstrate that they were either injured by Baycol, or that Baycol did not provide them any health benefits" to prove their claim under West Virginia law, "[i]ndividual evidence would be necessary as to each member of the putative class to determine whether the individual person benefited from or was injured by Baycol;" therefore, individualized questions of fact predominated. *See McCollins* Order (Ex. A1) at 10, 12. The court then entered summary judgment against the named plaintiff. *Id.* at 18-19.

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[2] The case was filed in Cabell County Circuit Court on August 22, 2001, removed to federal court, and transferred to the MDL. The claim of the original lead plaintiff in this case, Michael Eugene Black, was later dismissed with prejudice. For clarity, this brief will use *McCollins* – the name of the plaintiff remaining at the time of the class certification decision – to refer to the case. Because the *McCollins* filing preceded the filing of this case by a month, plaintiffs here are mistaken in asserting that they "were the first individuals from West Virginia to file a lawsuit asking for class status." Pls' Motion at 6.

2. Proceedings in Other State Courts

Pennsylvania coordinated proceedings and class certification ruling. More than 4,000 Baycol cases filed in Pennsylvania state court were coordinated in Philadelphia. As in the MDL, rhabdo cases settled. Ultimately, plaintiffs dismissed all but one case before trial, and that trial produced a defense verdict. *See Pauley v. Bayer AG*, No. 0203-02729, Verdict Form (Pa. Com. Pl., Nov. 23, 2004) (Ex. A19). Plaintiffs also moved for certification of nationwide and statewide classes. The court denied certification of the proposed economic loss classes, holding that individualized issues of reliance on Bayer's alleged misrepresentations and whether Bayer's alleged misrepresentations caused ascertainable loss precluded class certification. *Lewis v. Bayer AG*, 70 Pa. D.&C.4th 52, 2004 WL 1146692, at *18-19 (Pa. Com. Pl. 2004) (Ex. A7).

Oklahoma decertification order. In July 2002, an Oklahoma state court certified a statewide class of Oklahoma residents who claimed they suffered muscle injuries caused by Baycol. On October 16, 2008, that court ***decertified*** the class, holding that so few plaintiffs remained interested in pursuing their injury claims that class litigation is not a superior mechanism for resolving any remaining claims. *Cafky v. Bayer AG*, No. C-01-713 (Dist. Ct., Pottawatomie Co., Okla., Oct. 16, 2008) (Ex. A8).

Trials in other jurisdictions. In addition to the *Pauley* case discussed above, five other Baycol cases

have been tried to juries, all to defense verdicts.[3] In three of these cases, *Slaughter*, *Beard*, and *Hardy*, plaintiffs unsuccessfully sought recovery for purported economic losses.

C. This Litigation

This putative statewide class action was filed September 20, 2001. The First Amended Complaint ("Complaint") asserts claims for negligence, intentional infliction of emotional distress, strict liability, breach of express warranty, breach of implied warranties, violation of the WVCCPA, common law fraud, medical monitoring, and punitive damages. The parties conducted fact and expert discovery related to class claims asserted in the Complaint. On October 1, 2008, more than seven years after this case was filed, plaintiffs moved to certify a class action on behalf of "[a]ll West Virginia residents who purchased the drug Baycol in West Virginia." *See* Pls' Motion at 5. However, plaintiffs limited their request for relief to "consumer protection act claims as set forth in the complaint," *see id.*, which they subsequently explained include their warranty, common law, and WVCCPA claims. Thus, plaintiffs are not seeking class certification as to their claims for personal injury,

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[3] *Haltom v. Bayer Corp.*, No. 02-60165-04, Final Judgment (Dist. Ct., Nueces Co. Tex., May 23, 2003) (Ex. A20); *Hardy v. Bayer Corp.*, No. 251-01-6900COV, Final Judgment (Cir. Ct., Hinds Co., Miss., Apr. 9, 2003) (Ex. A21); *Slaughter v. Bayer Corp.*, No. 2002-41-CV8, Final Judgment (Cir. Ct., Jones Co., Miss., Dec. 9, 2003) (Ex. A22); *Beard v. Bayer AG*, No. 04-CV- 011-J, Final Judgment (Cir. Ct., Amite Co., Miss., Dec. 5, 2005) (Ex. A23); *Reed v. Bayer Corp.*, No. 2002-3 11 (Cir. Ct., Holmes Co., Miss., verdict returned Sept. 12, 2008) (Ex. A24).

wrongful death, or medical monitoring. Plaintiffs pray for "compensation for the improper charge" for purchases of Baycol and punitive damages. *See* Pls' Motion at 7, 24-26. Two plaintiffs purport to represent the putative class.

Keith Smith. Keith Smith is a 55 year-old welder and pipe fitter who has a history of high cholesterol, high blood pressure, joint injury, panic attacks, and dizziness predating his use of Baycol. *See* Dep. of Keith Smith (Ex. B1) at 47:17-48:13; 51:25-52:6; 58:22-60:5. He was prescribed 0.4 mg Baycol from March 13, 2000 to approximately May 4, 2001, to control his cholesterol. *See* Nov. 1, 2006 Dep. of Dr. Patsy Cipoletti ("Cipoletti Dep. II") (Ex. B2) at 4:20-5:1; Smith Dep. (Ex. B1) at 71:19-72:1; 82:8-83:7; 86:5-8. Mr. Smith took samples provided by his doctor and filled two Baycol prescriptions. *See* Smith Dep. (Ex. B1) at 75:10-76:7. He claims that Baycol caused him to feel nauseated and dizzy, and to experience joint pain. *See id.* at 6:12-18. He seeks recovery of the co-pay for his prescriptions. *Id.* at 89:22-90:10.

When Mr. Smith was prescribed Baycol, his physician, Dr. Patsy Cipoletti, discussed with him the medicine's potential side effects and gave him some written information about the medicine, though Mr. Smith does not recall this conversation or these materials. *See* Cipoletti Dep. II (Ex. B2) at 28:22-31:13; Smith Dep. (Ex. B1) at 72:13-22, 74:15-20; 87:1-19 (deferring to the medical records). Mr. Smith does not recall having ever seen a Baycol label or package insert. *See* Smith Dep. (Ex. B1) at 87:20-88:5. He relied on his physician's advice in taking Baycol. *See id.* at 88:19-21.

Baycol worked to lower Mr. Smith's cholesterol. *See* Cipoletti Dep. II (Ex. B2) at 38:22-39:9. No doctor has ever told Mr. Smith that Baycol caused him any injury. *See* Smith Dep. (Ex. B1) at 35:18-20. Mr. Smith's prescribing physician has never diagnosed him as having experienced any ill effects from Baycol. *See* Cipoletti Dep. II (Ex. B2) at 12:24-13:16; *accord* Dep. of Dr. Adel Frenn (Ex. B5) at 15:23-16:6, 22:18-20 (no complaints regarding Baycol); Dep. of Dr. Elizabeth Lim (Ex. B6) at 12:13-16 (same). Dr. Cipoletti also testified that Mr. Smith is not at risk of any future injury from his use of Baycol. Cipoletti Dep. II (Ex. B2) at 61:12-23.

Shirley Sperlazza. Shirley Sperlazza is a 57 year-old woman who has struggled with weight control, high blood pressure, arthritis, ankle swelling, and high cholesterol since before she ever ingested Baycol. *See* Sperlazza Dep. (Ex. B3) at 26:23-27:12; 28:10-13; 30:18-21; 32:8-14; 65:22-66:2. She was prescribed 0.4 mg Baycol from April 26 to August 9, 2001. *See* October 20, 2006 Dep. of Dr. Patsy Cipoletti ("Cipoletti Dep. I") (Ex. B4) at 65:5-24.

At the time Ms. Sperlazza was prescribed Baycol, her physician, also Dr. Cipoletti, discussed with her contraindications and warnings related to Baycol, and provided her with written literature regarding the medicine, though she does not recall this conversation or literature. *See* Cipoletti Dep. I (Ex. B4) at 66:18-67:16; Sperlazza Dep. (Ex. B3) at 60:24-61:9 (deferring to the medical record notations), 111:4-9. Ms. Sperlazza never saw any advertising related to Baycol. *See id.* at 64:16-18. She relied on Dr. Cipoletti to provide her with the pertinent information regarding the medicine. *See id.* at 64:3-11.

Ms. Sperlazza claims that Baycol caused her to experience dark urine, arm and leg pain, and ankle swelling, though she never reported these alleged effects to her doctor. *See id.* at 65:4-21; 68:24-69:6; 70:20-23; 77:7-11. Ms. Sperlazza admits that no physician has ever told her that she has experienced any ill effects or can expect future ill effects from taking Baycol. *See id.* at 10:3-6; 13:24-14:2. Moreover, Baycol lowered her cholesterol. *See id.* at 73:5-21; Cipoletti Dep. I (Ex. B4) at 69:16-70:23. Her doctor testified that Ms. Sperlazza "did well" on Baycol and had no problems with the medicine. *See* Cipoletti Dep. I (Ex. B4) at 17:10-17. Ms. Sperlazza seeks her out-of-pocket expenses for Baycol not covered by insurance, though she was unable to quantify those expenses. Sperlazza Dep. (Ex. B3) at 73:25-74:10; 103:12-104:8.

Plaintiffs' Putative Experts. Plaintiffs have identified two purported "expert" witnesses in support of class certification. Stephen Raskin, a cardiologist, claims that Baycol was more dangerous than other statins on the market at the same time, that Baycol's labeling should have included additional post-marketing adverse event data, and that Bayer misrepresented the safety and efficacy of Baycol. *See* Report of Dr. Stephen Raskin (Ex. C1). The same report by Dr. Raskin was largely excluded as unreliable in the MDL. *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1067-69 (D. Minn. 2007) (Ex. A6) (applying *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)). During his deposition here, Dr. Raskin conceded that Baycol worked for many patients, and did not result in any ill effects for most patients. *See* Dep. of Stephen Raskin, M.D. (Ex. C2) at 104:19-105:8; 113:16-20. He also acknowledged that information available about Baycol changed over time, and that the

reasonableness of Bayer's conduct must be measured in relation to the available information over time. *Id.* at 168:9-169:1; 222:11-17.

Purported marketing expert Warren Keegan opined that Bayer's marketing of Baycol was "designed to mislead the patient" and "intended to deceive the customer." Pls' Suppl. Expert Witness Disclosure (Ex. C3) at 2; Dep. of Warren Keegan, Ph.D. (Ex. C4) at 11:9-13. But Dr. Keegan conceded that: (a) he had not read any of the Baycol labels, *id.* at 131:19-22; (b) he had not read any Baycol package insert, *id.* at 127:9-128:5; (c) he does not know whether Baycol was accompanied at any time by a patient package insert, *id.* at 134:6-9; (d) he has never seen or reviewed any direct-to-consumer advertising for Baycol, *id.* at 200:16-201:4; (e) he has never conducted any studies about what information West Virginian Baycol patients received when prescribed the medication, *id.* at 113:6-8; 113:14-18; 113:23-114:1; 131:19-22; and (f) he agreed to testify against Bayer before reading any Bayer documents, *id.* at 52:4-56:10.[4]

ARGUMENT

Plaintiffs' motion for class certification should be denied for two reasons. First, plaintiffs are collaterally estopped. This issue was vigorously contested before the MDL court, which entered a final judgment holding that a West Virginia economic loss class

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[4] *See* Dep. of Yoram Wind, Ph.D. (Lauder Professor at the Wharton School of Business and defense marketing expert) (Ex. D4) at 56:20-60:22 (discussing flaws in Dr. Keegan's methodology). The depositions of defense experts are collected in Exhibit Volume D.

cannot be certified. Plaintiffs cannot take another bite at the apple here. Second, plaintiffs cannot meet the standards for class certification under West Virginia law. Their proposal to try punitive damages on a classwide basis violates due process.

I. PLAINTIFFS ARE ESTOPPED FROM SEEKING CLASS CERTIFICATION.

On August 25, 2008, Chief Judge Davis concluded that an economic loss class action brought on behalf of West Virginia Baycol purchasers did not meet the requirements for class certification. *McCollins* Order (Ex. A1) at 10-12, 18-19. This ruling estops plaintiffs from relitigating the same issue here. Collateral estoppel bars reconsideration of a previously decided issue when: "(1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *State v. Miller*, 459 S.E.2d 114, 120 (W. Va. 1995). Because each of these requirements is met here, plaintiffs may not relitigate certification of an economic loss class of West Virginia Baycol purchasers.

An Identity of Issues Exists. The consumer class that plaintiffs seek to certify involves the same issue decided in *McCollins*: Is a state-wide economic loss class of West Virginia Baycol purchasers cognizable under West Virginia law? *Compare* Pls' Motion at 5 *with McCollins* Complaint (Ex. A2) at ¶ 30. *McCollins* answered that question in the negative, and plaintiffs

are estopped from revisiting that determination here. Where the putative classes are the same, issue preclusion applies. *E.g., In re Dalkon Shield Punitive Damages Litig.*, 613 F. Supp. 1112, 1115-19 (E.D. Va. 1985) (Ex. A30); *accord Miller,* 459 S.E.2d at 120.

As in *McCollins,* Bayer's alleged misrepresentations regarding the safety and efficacy of Baycol are central to the class allegations here. *Compare* Pls' Motion at 7 ("Plaintiffs would not have purchased Baycol with knowledge of the aforesaid [alleged misrepresentations] and believe they were misled to buy this defective drug") *with McCollins* Complaint (Ex. A2) at ¶ 63 (alleging that, due to "unfair and deceptive trade practices and/or consumer fraud, Plaintiffs and the Class have suffered . . . economic loss that includes the purchase price of [Baycol]"). Thus, plaintiffs present the same argument as Mr. McCollins – that the class can be certified because liability can be established based solely on the "common" issue of Bayer's alleged misconduct.

This central issue is the same regardless of the theory of liability under which it is asserted. *See Holloman v. Nationwide Mut. Ins. Co.*, 617 S.E.2d 816, 821 (W. Va. 2005) ("Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit"); *Haba v. Big Arm Bar & Grill, Inc.*, 468 S.E.2d 915, 919 (W.Va. 1996) (if, "in all material aspects," the same factual issues arise in the current action as were litigated in the prior action, the case is precluded, regardless of the name the parties give to the factual issue). Thus, plaintiffs cannot avoid estoppel because

their complaint includes a claim for common law fraud that was not pled in *McCollins*. *See Taylor v. Sturgell*, __ U.S. __, 128 S. Ct. 2161, 2171 (2008) (Ex. A35) (collateral estoppel "bars 'successive litigation of an issue of fact or law actually litigated and resolved' . . . even if the issue recurs in the context of a different claim") (internal quotation omitted).

Plaintiffs cannot salvage the putative class by arguing that Chief Judge Davis applied a different standard for class certification than would this Court. The key to this dispute is a substantive legal issue that Judge Davis necessarily decided in denying certification: He held that resolution of class claims for economic loss requires inquiry into individual efficacy and injury. *McCollins* Order (Ex. A1) at 10-12, 18-19. That substantive ruling – which is critical to an evaluation of all requirements for class certification under both federal and West Virginia law – is precisely the issue that plaintiffs seek to relitigate here. *See Rezulin*, 585 S.E.2d at 63 (holding that evaluation of the substantive nature of plaintiffs' claims is needed to determine whether class certification is appropriate). Because the propriety of an economic loss class of West Virginia Baycol purchasers already has been decided in *McCollins*, collateral estoppel applies no matter how plaintiffs characterize their claims here.

***Plaintiffs' Position on Class Certification Was Vigorously Litigated in* McCollins.** Collateral estoppel precludes not only those parties named in a previous lawsuit, but also unnamed plaintiffs who were adequately represented in that prior action. *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 764, 768-69 (7th Cir. 2003) (Ex. A28), *Miller*, 459 S.E.2d at 120. "[U]nnamed class members have

the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them." *In re Bridgestone*, 333 F.3d at 768. Where absent class members were adequately represented when class certification is litigated in one case, they are precluded from making a second attempt at class certification in another Court. *Id.* at 769.

In *McCollins*, counsel and the named plaintiff vigorously litigated the issue of whether an economic loss class of West Virginia Baycol purchasers could be certified. Mr. Smith and Ms. Sperlazza were members of that putative class – the *same class* that they now ask this Court to certify. *Compare* Pls' Motion at 5 with *McCollins* Complaint at (Ex. A2) ¶ 30 *and McCollins* Order (Ex. A1) at 3. Indeed, Mr. McCollins had the same incentives as these plaintiffs to vigorously litigate whether the need to prove individual injury and causation precluded certification of an economic loss class. His doctor, like the doctors for Mr. Smith and Ms. Sperlazza, testified that Mr. McCollins suffered no injury caused by Baycol and benefited from the medicine. *See* Dep. of Dr. W. Michael Skeens ("Skeens Dep.") in *McCollins* (Ex. A4) at 77:16-20, 78:12-79:2, 86:8-13; *see also supra*, at 8-9. Accordingly, plaintiffs here are precluded from seeking certification of the same economic loss class rejected in *McCollins*.

The* McCollins *Class Certification Denial Is Final. Chief Judge Davis's decision denying certification of the putative class of West Virginia Baycol purchasers in *McCollins* is a final judgment entitled to preclusive effect under the laws of West Virginia. After that court denied certification and

dismissed the underlying claims, the *McCollins* class had 30 days to appeal the judgment under the Federal Rules of Appellate Procedure. Fed. R. App. P 4(a)(1)(A). No appeal was taken, rendering that judgment final on September 25, 2008 – five days before plaintiffs moved for certification of an identical economic loss class in this Court. Given the binding effect of Chief Judge Davis's final judgment in *McCollins*, plaintiffs may not now collaterally attack the judgment by seeking the same relief here. *See Gribben v. Kirk*, 466 S.E.2d 147, 157 (W. Va. 1995) (holding that "[t]he State's failure to appeal [a prior adverse] judgment collaterally estops it from relitigating the . . . issue") (internal citations omitted).

II. EVEN IF PLAINTIFFS ARE NOT BARRED FROM RELITIGATING CLASS CERTIFICATION, THEY HAVE FAILED TO CARRY THEIR BURDEN OF DEMONSTRATING THAT A CLASS SHOULD BE CERTIFIED.

An additional and independent basis for denying class certification is that plaintiffs cannot bear their burden of establishing the requirements for class certification under West Virginia law. This brief focuses first on the two Rule 23(b)(3) requirements – predominance and superiority – and the Rule 23(a) requirement of adequacy.

A. Individual Issues of Fact Predominate.

As the Supreme Court of Appeals explained in *Rezulin*: "A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them." *Rezulin*, 585 S.E.2d at 72.

Examination of the evidence is necessary to determine whether plaintiffs can carry their burden of proving that their claims can be established through common evidence. *Id.*

Here, plaintiffs are pursuing four claims: violation of the WVCCPA, common law fraud, and breach of express and implied warranty. Complaint ¶¶ 46-58. These claims turn on individual issues of fact. *See infra*, Part 1. Even plaintiffs' putative common issues cannot be resolved without consideration of facts unique to each member of the putative class. *See infra*, Part 2. Because individual issues predominate, plaintiffs cannot carry their burden of showing that this case should proceed as a class action. *See* W. Va. R. Civ. P. 23(b)(3).

1. Plaintiffs' *Prima Facie* Case Requires Proof Unique to Each Putative Class Member.

As the Supreme Court directs in *Rezulin*, we turn first to the nature of the evidence that must be considered to prove plaintiffs' claims. Plaintiffs' *prima facie* case on each of their economic loss claims requires proof that can only be established on a plaintiff-by-plaintiff basis. In particular, each of plaintiffs' claims requires proof of at least two of the following elements: (a) whether a particular plaintiff got what he or she bargained for, (b) that the plaintiff relied on the alleged misrepresentation, and (c) that the alleged misrepresentation caused plaintiff's alleged injury.

a. *The Bargain.* To prove a claim under the WVCCPA or for breach of express warranty, a plaintiff

must prove that he did not get what he bargained for. *See Rezulin*, 585 S.E.2d at 75 (consumer must "prove[] that he or she has purchased an item that is different from or inferior to that for which he bargained" to establish an "ascertainable loss"); *Reed v. Sears, Roebuck & Co., Inc.*, 426 S.E.2d 539, 546 (W. Va. 1992) ("an express warranty is created *only* when the affirmation of fact, promise or description of the goods is part of the basis of the bargain made by the seller to the buyer about the goods being sold").

Here, plaintiffs allege that they bargained for a medicine that "was safe and effective for use." Complaint ¶ 26; *see id.* ¶ 29. The evidence shows that the question of whether Baycol was safe and efficacious for a putative class member can only be decided plaintiff-by-plaintiff. The doctor who prescribed Baycol for Mr. Smith and Ms. Sperlazza testified that Baycol was efficacious for both plaintiffs. Cipoletti Dep. I (Ex. B4) at 69:16-70:23 (Sperlazza); Cipoletti Dep. II (Ex. B2) at 38:22-39:9 (Smith). Moreover, he testified that neither of the named plaintiffs suffered an injury caused by Baycol. Cipoletti Dep. I (Ex. B4) at 17:10- 17 (Sperlazza); Cipoletti Dep. II (Ex. B2) at 12:24-13:16 (Smith).[5] Plaintiffs' own putative expert testified that whether Baycol benefited a particular individual can only be determined plaintiff-by-plaintiff:

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[5] Mr. Smith and Ms. Sperlazza contend that they were injured, but injury in a complex medical case cannot be established on the basis of a plaintiff's self-diagnosis. Expert medical evidence is required. *Strahin v. Cleavenger*, 603 S.E.2d 197, 211-12 (W. Va. 2004).

Q: When you prescribe drugs, sir, do you assume that all patients are the same or that they are all different?

A: They are all different. I attempt to generalize the disease, but individualize the patient.

Q: Is it fair to say, sir, that patients can respond differently to the same medication?

A: There is definitely individual variation.

Raskin Dep. (Ex. C2) at 46:1-12; *see also id.* at 104:19-105:8; 113:16-20 (testifying that most people who took Baycol suffered no injury). Thus, the evidence given by plaintiffs' own doctors and putative expert shows that "the proof needed to establish" whether plaintiffs got the benefit of their bargain – the core of plaintiffs' WVCCPA and breach of warranty claims – must be introduced plaintiff-by-plaintiff. *See Rezulin*, 585 S.E.2d at 74-75.

b. *Reliance.* Plaintiffs must prove reliance to establish their *prima facie* cases on common law fraud and breach of the implied warranty of fitness for a particular purpose. *See Highmark West Virginia, Inc. v. Jamie*, 655 S.E.2d 509, 515 (W. Va. 2007) (internal citation omitted) (to prove common law fraud, a plaintiff must show that he or she "'relied upon [a fraudulent act] and was justified under the circumstances in relying upon it'"); W. Va. Code § 46-2-315 (requiring proof of reliance for plaintiffs' breach of implied warranty of fitness for particular purpose claim); *Jones, Inc. v. W.A. Wiedebusch Plumbing & Heating Co.*, 201 S.E.2d 248, 253-54 (W. Va. 1973)

(proof of actual reliance by buyer required for recovery on breach of implied warranty of fitness for particular purpose). If the consumer did not rely on the purported misrepresentations, there can be no claim for fraud or breach of the implied warranty of fitness for a particular purpose

The record before this Court shows that reliance can only be established based on evidence unique to each putative class member. Both Mr. Smith and Ms. Sperlazza testified that they relied entirely on Dr. Cipoletti for information about Baycol. *See* Sperlazza Dep. (Ex. B3) at 64:3-11; Smith Dep. (Ex. B1) at 88: 19-21. Neither plaintiff had even heard of Baycol until Dr. Cipoletti prescribed the medicine. Sperlazza Dep. (Ex. B3) at 64:19-22; Smith Dep. (Ex. B1) at 42:7-9. Dr. Cipoletti provided plaintiffs with information on Baycol's potential side effects. Cipoletti Dep. I (Ex. B4) at 66:18-67:16 (Sperlazza); Cipoletti Dep. II (Ex. B2) at 28:22-31:13 (Smith). However, plaintiffs do not remember what they were told or what literature they received. Sperlazza Dep. (Ex. B3) at 60:24-61:9; Smith Dep. (Ex. B1) at 72:13-22, 74:15-20, 87:1-19. These facts about the Smith and Sperlazza claims cannot be applied to the claims of absent class members. Indeed, plaintiffs' putative class expert Dr. Raskin testified that individual patients are counseled differently about their prescriptions. *See* Raskin Dep. (Ex. C2) at 97:19-21. Thus, on this record, plaintiffs cannot carry the burden of showing that reliance can be established through common proof. To the contrary, all of the record evidence confirms that proof of reliance is an issue unique to each plaintiff that can only be established through individual proof. *Accord Lewis*, 2004 WL 1146692, at *18-19 (Ex. A7); *Jensen*, 2003 WL 2296243, at *4 (Ex. A9).

c. Causation of the Alleged Injury. All four of plaintiffs' economic loss claims require proof of individual causation. To establish a *prima facie* case under the WVCCPA, a plaintiff must demonstrate that he or she sustained the ascertainable loss "as a result of" a prohibited act. *See* W. Va. Code. § 46A-6-106(1). Similarly, breach of warranty and fraud claims require a showing that the breach or the alleged fraud caused the plaintiff's injury. *See Jones*, 2002 WL 32097528 at *2 (breach of warranty and WVCCPA claims require proof of causation); *Cavcon, Inc. v. Endress + Hauser, Inc.*, 557 F. Supp. 2d 706, 730-31 (S.D. W. Va. 2008) (Ex. A29) (where a plaintiff establishes reliance on a defendant's act but cannot prove damages resulting from that reliance, the action in fraud does not succeed); *Cordial v. Ernst & Young*, 483 S.E.2d 248, 250 (W. Va. 1999) (action for fraud requires proof that damages were caused by the fraudulent act or omission alleged).

On the record before this Court, plaintiffs cannot carry their burden of showing that causation can be established by common proof. To the contrary, the record demonstrates the inherently individual nature of the evidence required to establish causation. As set forth above, the record shows that Baycol lowered the cholesterol of both of the named plaintiffs and did not harm them. *See supra*, at 8-9. Thus, the question of whether these plaintiffs suffered an injury caused by Baycol will turn on facts unique to their claims. The same will be true as to each member of the putative class, creating an individual issue that precludes class certification. *See McCollins* Order (Ex. A1) at 11-12. The individual causation inquiries that will be required to resolve the causation element of alleged "consumer protection act claims" overwhelm any

"common" issues; accordingly, these individual issues of fact preclude certification of economic loss claims. *See In re Baycol Prods. Litig.*, 218 F.R.D. at 213-14 (Ex. A5); *McCollins* Order (Ex. A1) at 11-12; *Lewis*, 2004 WL 1146692, at *18-19 (Ex. A7).

2. Purportedly "Common" Issues Identified by Class Counsel Require Individualized Inquiries.

The discussion above addresses only a few of the individual issues that must be resolved to adjudicate these claims. Plaintiffs pose six purportedly "common" issues that they contend apply to all class members and predominate over any individual issues. Pls' Motion at 6. However, the record before this Court shows that these purportedly "common" issues cannot be decided through evidence that would be common to all class members. Rather, these issues are replete with myriad individual issues of fact.

PUTATIVE COMMON ISSUE 1:
Was the product defective in that it was not reasonably safe for its intended use?

Plaintiffs' first "common" question actually is replete with individual issues of fact. *First*, Baycol was marketed in four different doses over the class period. *See* Baycol Package Inserts (Group Ex. A10). The putative class representatives took the 0.4 mg dose. Cipoletti Dep. II (Ex. B2) at 4:20-5:1; Cipoletti Dep. I (Ex. B4) at 65:5-24. An adjudication that the 0.4 mg dose was or was not reasonably safe would not determine whether the 0.2 mg, 0.3 mg, and 0.8 mg doses were safe.

Second, plaintiffs' own expert does not criticize Baycol as unreasonably safe at the time the medicine received FDA approval and was launched. Raskin Dep. (Ex. C2) at 153:6-154:6, 159:7-10. Dr. Raskin conceded that information about the possible risks of Baycol emerged over time. *Id.* at 168:9-169:1; 222:11-17. That changing knowledge gives rise to additional individual issues of fact. *In re Baycol*, 218 F.R.D. at 208 (Ex. A5).

Third, Baycol was marketed under seven different labels during the class period. *See* Baycol Package Inserts (Group Ex. A10). The label of a prescription medicine is part of the product. *See Kordel v. United States*, 335 U.S. 345, 350 (1948) (labeling "plainly includes what is contained within the package whether or not it is 'upon' the article or its wrapper or container"). Therefore, the safety of a particular dose of Baycol must be decided based on the label then in use.

Fourth, both of the putative class representatives used Baycol in "monotherapy" – without simultaneous prescription of a fibrate – to help control lipid levels. *See* Smith Dep. (Ex. B1) at 88:22-89:6; Sperlazza Dep. (Ex. B3) at 63:11-22. However, some members of the putative class were co-prescribed Baycol with the fibrate gemfibrozil; the post-marketing reporting rate for rhabdo was higher when those medicines were prescribed together. *See* Aug. 8, 2001 "Dear Health Care Professional" Letter (Ex. A14). Bayer withdrew Baycol because – in spite of warning labels and letters, and a contraindication of coprescription – the practice continued. *Id.* Thus, cases in which a putative class member was taking both Baycol and gemfibrozil raise an additional set of issues, which could vary based on dose and label changes.

In short, whether Baycol was "not reasonably safe" is not one common question; it encompasses a multitude of questions that will vary, depending on when and how each absent class member took a particular dose of Baycol. Adjudication based on the claims of the putative class representatives will throw no light on the different factual circumstances of absent class members. Accordingly, individual issues of fact predominate even as to this "common issue."

PUTATIVE COMMON ISSUE 2:
Was the product defective in that its instructions and warnings were not adequate?

As noted above, Baycol was sold under seven different labels. *See* Baycol Package Inserts (Group Ex. A10). The final two labels also included a consumer package insert; that insert was in use during the time Ms. Sperlazza took the medicine and part of the time Mr. Smith did. *See id.* at BAYCORP01409132D, BAYCORP01420496D. Different absent class members purchased Baycol with different labels. These differences give rise to individual issues of fact.

Thus, an adjudication that a label was or was not adequate as to the named plaintiffs could not be applied to the claims of absent class members. For instance, a determination that the labeling regarding Baycol was adequate in 2001 – when Mr. Smith and Ms. Sperlazza took the medicine – would have no bearing on whether a 1999 label was adequate. Because Mr. Smith and Ms. Sperlazza used Baycol in monotherapy, their cases do not even present issues about the adequacy of co-prescription warnings.

An issue is common where adjudication of that issue as to the class representatives could be applied to the claims of absent class members. *See Blades v. Monsanto Co.*, 400 F.3d 562, 566-567 (8th Cir. 2005) (Ex. A27) (defining individual issues and common issues for class certification purposes). Here, the adequacy of the various Baycol labels raises myriad individual issues.

PUTATIVE COMMON ISSUES 3 AND 4: Did defendant breach its warranty to plaintiffs? Did defendant violate West Virginia Code 46A-6-1 et seq., the West Virginia Consumer Protection Act, and, if so, what damages may plaintiffs recover under that statute?

As discussed above, plaintiffs' warranty and WVCCPA claims will require individual proof of whether a plaintiff received the benefit of his or her bargain (*i.e.*, was the plaintiff allegedly injured by Baycol or did the medicine fail to lower plaintiff's cholesterol), whether a purported misrepresentation by Bayer caused that plaintiff's alleged injury and, in the case of the implied warranty of fitness for a particular purpose, whether the class member relied on Bayer's representations in purchasing Baycol. These issues cannot be resolved *en masse* by reference to the experiences of Mr. Smith and Ms. Sperlazza or by speculating about the experiences of absent class members. They are individual issues.

PUTATIVE COMMON ISSUE 5:
Did defendant intentionally injure persons in the class?

Plaintiffs contend that proof of whether Bayer intentionally injured individual class members is "common." As with plaintiffs' other "common issues," this one depends on individual determinations of fact that changed over time.

While Baycol was on the market, the information available to Bayer regarding the safety and efficacy of Baycol was ever-evolving. Indeed, plaintiffs' expert Dr. Stephen Raskin testified that there was no reason to suspect that Baycol posed any risks beyond those common to all statin medications at the time Baycol was launched in the United States. *See* Raskin Dep. (Ex. C2) at 159:7-10. Dr. Raskin does not take issue with Baycol receiving FDA approval. *Id.* at 153:6-154:6. Nor does he criticize Bayer's promotion of the medicine until after certain information became available to Bayer in 1999. *See id.* at 221:8-222:17. Thus, plaintiffs' own expert has conceded that Bayer's knowledge changed over time and cannot be adjudicated as a common issue.

What Bayer knew about the doses that were marketed and prescribed, or the indications for use of Baycol with other medications, at each point in time that a class member purchased Baycol bears directly on the question of whether Bayer intended to injure West Virginia purchasers of Baycol. *See In re Baycol Prods.*, 218 F.R.D. at 208 (Ex. A5) ("Plaintiffs' claims of failure to warn turn on what Defendants knew at the time Baycol was prescribed. As the class members

were prescribed Baycol at different times, the issue of Defendants' knowledge will differ from case to case").

Additionally, plaintiffs' "common" question assumes that everyone in the class was injured. As discussed above, whether any class member experienced a Baycol-related injury can only be determined on a plaintiff-by-plaintiff basis. Accordingly, this common issue also is replete with individual issues of fact.

PUTATIVE COMMON ISSUE 6:
Did the defendant recklessly, willfully, intentionally, or otherwise engage in conduct subjecting it to punitive damages in this case and, if so, what are the punitive damages that this defendant should pay?

The propriety of punitive damages depends on individualized proof. To succeed in a punitive damages claim, an individual plaintiff must establish that defendant's conduct toward him or her amounts to "'willfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff.'" *See Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692, 694 (W. Va. 1982) (citation omitted). This requires a fact-specific inquiry. *See, e.g., Kessell v. Leavitt*, 511 S.E.2d 720, 816 (W. Va. 1998) ("we review awards of punitive damages in the first instance to determine whether the facts and circumstances of the case at issue are sufficient to permit an award of such damages"); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 899-900 (W. Va. 1991) (requiring that punitive damages "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred"). Due process

mandates that plaintiffs' sixth "common" issue not be resolved in the class setting.

"The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 508 U.S. at 416. Punitive damages must bear some relation to actual damages awarded to an individual plaintiff. *Id.* at 418 (requiring consideration of, among other things, "the disparity between actual or potential harm suffered by the plaintiff and the punitive damages award"); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001) (applying due process and Eighth Amendment in review of punitive damages award); *BMW of North America v. Gore*, 517 U.S. 559, 575, 580-83 (1996).

If there is no evidence of particularized injury to absent class members, a jury would not have the information necessary to make a punitive damages award and there would be no way for this Court or any reviewing court to determine whether a jury verdict establishing a punitive damages ratio or awarding a lump sum passes constitutional muster. For example, even if a jury were to impose punitive damages on Bayer for its conduct with regard to Mr. Smith and Ms. Sperlazza, that award could not provide a reasonable basis upon which to extend punitive damages to every member of the class. Mr. Smith and Ms. Sperlazza both took 0.4 mg Baycol, and neither took Baycol prior to 2000. Bayer's conduct in relation to Mr. Smith and Ms. Sperlazza cannot be imposed on an earlier period of time, when Bayer had a different understanding of adverse effects in connection with Baycol and used different promotional messages, or on Bayer's

activities with respect to other doses of Baycol, which were marketed differently over time.

Mr. Smith's and Ms. Sperlazza's individual experiences with Baycol, or any other individual purchaser's experience, cannot provide a reasonable basis upon which to award punitive damages on a classwide basis.[6] There can be no proportionality of a punitive damage award to absent class members where the facts and circumstances of each class member's circumstances have not been tried. Accordingly, the Court should reject plaintiffs' effort to certify a class action seeking punitive damages.

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[6] Plaintiffs' claim that "like adjudication of punitive damages already has been accomplished" is not supported by the precedent cited. For example, plaintiffs cite to the mass consolidation of *individual* claims seeking relief for exposure to asbestos referred to as *In re Asbestos III*. This consolidated proceeding was not a class action, and included the specific evaluation of thousands of plaintiffs. *See State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 (W. Va. 2002) (providing procedural background). Further, plaintiffs' claim that "Defendants' usual objections concerning receiving multiple punishments for the same conduct can be accommodated" is beside the point. Plaintiffs' putative class would cover Bayer's conduct over a years-long span while Baycol was marketed. Bayer's conduct in the promotion of Baycol changed over time, and was different for varying doses. Accordingly, citation to precedent such as *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156 (S.D. W. Va. 1996) (Ex. A26), which involves an alleged singular course of uniform conduct, is inapposite.

B. A Class Action Is Not Superior Here Because the Proposed Class Trial Would Be Unmanageable and Unlikely To Benefit Absent Class Members.

Even though plaintiffs seek punitive damages, they argue that their economic loss claims should be certified because they are of limited value and could not be pursued outside a class action. Pls' Motion at 24'26. But low case value alone does not make class litigation superior. Plaintiffs are inviting this Court to embark on an unmanageable project that – even if successful for plaintiffs at the class trial stage – would be unlikely to produce any real benefit for absent class members.

Even under plaintiffs' class proposal, after any class trial, putative absent class members would have to come forward to demonstrate that they purchased Baycol and to prove their damages. Bayer contends that absent plaintiffs also would have to participate in successive individual trials, at which plaintiffs would have to prove that they were harmed by or did not benefit from Baycol, that their purported injuries were caused by misrepresentations by Bayer, and – for some causes of action – that plaintiffs relied on these misrepresentations. The need for these trials destroys any efficiencies that plaintiffs claim for the class trial. *See Thorogood v. Sears, Roebuck and Co.*, __ F.3d __, 2008 WL 4709500, at *4-6 (7th Cir. Oct. 28, 2008) (A36) (ordering decertification of class where individualized hearings would be required to establish class members' individualized understanding of purported misrepresentations).

Plaintiffs invite the Court to "utiliz[e] classes, sub-classes and conditional certification" to accomplish this daunting task. Pls' Motion at 5. But the use of classes and sub-classes would not generate any true efficiencies. *See Jensen*, 2003 WL 22962431, at *5 (Ex. A9). For example, a sub-class of "consumer protection act" claims for West Virginians who purchased the 0.4 mg dose, such as Mr. Smith and Ms. Sperlazza, would involve myriad questions of fact that do not apply to the claims of other putative class members. Because Baycol warnings changed over time, Bayer's knowledge about 0.4 mg Baycol (as a monotherapy or in combination with other medications) changed over time, and information available to the public changed over time, sub-sub-classes would need to be created to cover time frames different from those at issue in the Smith and Sperlazza claims. *See* Raskin Dep. (Ex. C2) at 168:9-169:1; 222:11-17 (testifying that what Bayer and the public knew about Baycol was changed constantly over the time Baycol was marketed). The Court would need to further subdivide those sub-classes to distinguish those who purchased Baycol for use in monotherapy from those who purchased the medicine to use in combination with a fibrate or other drugs. This division also would need to occur across marketed dosage levels (0.2 mg, 0.3 mg, 0.4 mg, 0.8 mg). Such a process would render the class action unmanageable and inefficient, and would result in an interminable trial in which a jury would be required to return myriad individual findings of fact.

Moreover, there is no reason to believe that absent class members would come forward to prove class membership and to try their individual claims. In the MDL and Philadelphia, most plaintiffs pursuing potentially-more-valuable injury claims elected to

dismiss their claims or allow them to be dismissed, rather than respond to discovery. *See supra*, at 4, 6. An Oklahoma court recently decertified a Baycol injury class, concluding that a class trial was not superior because too few absent class members showed interest in pursuing their claims at this late stage in the litigation. *See id.* at 6-7. The putative class representatives in this case – who claim to have a strong interest in representing the proposed class and who are represented by counsel – could not testify to the value of the claims they are asserting in this lawsuit. Smith Dep. (Ex. B1) at 89:22-90:10; Sperlazza Dep. (Ex. B3) at 73:25-74:10, 103:12-104:8. The only reason we know the value of those claims is that Bayer obtained discovery of plaintiffs' pharmaceutical records.[7] Thus, the record suggests that few or no absent class members actually would benefit from any class trial here.

In short, plaintiffs here are asking the Court to tackle the enormous management problem of a class trial, when there is little prospect that the members of the putative class actually would benefit from the proceedings. There is no authority for the proposition that a class should be certified where a long litigation history shows that absent class members are unlikely to benefit from the proceedings. A class would not serve the interests of absent class members or of the citizens of Brooke County, who would bear the expense

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[7] *See* Traubert Pharmacy Records (Ex. E1) (showing Smith's co-pay for Baycol totaled $42.00); Rite-Aid Pharmacy Records (Ex. E2) (showing Sperlazza's co pay for Baycol totaled $26.61). Because these pharmacy records contain confidential information, Bayer has filed them under seal, accompanied by a motion requesting that the Court enter those exhibits into the record.

of a protracted, unmanageable class trial. Accordingly, plaintiffs have not met their burden of proving the superiority of a class action.

C. The Named Plaintiffs Are Not Adequate Representatives of the Putative Class.

Smith and Sperlazza cannot adequately represent absent class members at a class trial because not all absent class members are similarly situated. *See* W. Va. R. Civ. P. 23(a)(3) and (4); *see also Rezulin*, 585 S.E.2d at 68-69; *Amchem*, 521 U.S. at 625-26 (mandating that class representatives be part of the class or subclass and possess the same interest and injury as absent class members); *In re: Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996) (Ex. A25) (due process forbids certification of a class where the claims of named plaintiffs are not congruent with those of absent class members); *see also Jones v. Allercare, Inc.*, 203 F.R.D. 290, 302 (N.D. Ohio 2001) (Ex. A32).

For instance, an absent class member who took 0.3 mg Baycol in monotherapy right after the drug was introduced, when Bayer had less knowledge about Baycol's side-effects, might have a weaker claim than someone who took 0.8 mg Baycol and gemfibrozil in the year Baycol was withdrawn from the market, when Bayer presumably would have had the most knowledge about the medicine. Neither of the putative class representatives (both of whom took 0.4 mg Baycol in 2000 and/or 2001) are situated similarly to the hypothetical absent class members described above. Litigation of Mr. Smith's or Ms. Sperlazza's claims would not resolve the claims of the absent plaintiffs.

Indeed, Mr. Smith and Ms. Sperlazza's interests conflict with those of absent class members who may allege a Baycol-related injury and would arguably have stronger evidence of "ascertainable loss." Moreover, when these putative class representatives decided not to seek certification of injury claims, they exposed all purportedly injured plaintiffs to the risk that their injury claims would be barred under the rule against splitting causes of action. *See, e.g., Shrewsberry v. Hrko,* 527 S.E.2d 508, 512 (W. Va. 1999); *O'Dell v. Town of Gauley Bridge,* 425 S.E.2d 551, 565 n.17 (W. Va. 1992); *see State Farm Mut. Auto. Ins. Co. v. DeWees,* 101 S.E.2d 273, 276 (W. Va. 1957) (barring second action brought by insured for property damage not sought in first action brought by insured for personal injury on same set of operative facts). Numerous courts have held that putative class representatives who engage in claim-splitting are inadequate. *E.g., Martin v. Home Depot U.S.A., Inc.,* 225 F.R.D. 198, 203-204 (W.D. Tex. 2004) (Ex. A34) (holding that pursuit of property damage claims only, and not personal injury claims alleged, demonstrated that class plaintiffs were inadequate and "conducting this litigation without fully considering the interests of the class"); *Feinstein v. Firestone Tire & Rubber Co.,* 535 F. Supp. 595, 606-607 (S.D.N.Y. 1982) (Ex. A31) (holding named plaintiffs inadequate for abandoning injury and death claims and pursuing only breach of warranty claims on behalf of the class).

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification should be denied.

Respectfully submitted this 30th day of October, 2008

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[*Certificate of Service Omitted In Printing of this Appendix*]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed November 17, 2008]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Black, et al. v. Bayer Corp., et al.	)
	)

RESPONSE IN OPPOSITION TO BAYER CORPORATION'S EXPEDITED MOTION FOR A PERMANENT INJUNCTION

Respondents Keith Smith and Shirley Sperlazza are class representatives in *Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (1-3) JPM, a civil suit filed in the Circuit Court of Brooke County, West Virginia on September 20, 2001,[1] seeking class certification of

[1] One reading Bayer Corporation's motion would be left with the impression that plaintiffs were both aware of the *McCollins* case and were willing members of the class proposed in such case, and only sought to seek their own class action after this Court's denial of class certification. However, nothing further from the truth could be represented. Respondents filed their lawsuit seeking class certification in 2001 and have had numerous hearing dates set for class certification only to have them continue due to the necessity of further discovery. Indeed, respondents were not even

a West Virginia-only class concerning claims regarding the manufacture, sale, advertisement, warnings, and use of Baycol. These class representatives do not consent to this Court's personal jurisdiction over them or the West Virginia Class they seek to represent and, with all due respect, objects to this Court exercising personal jurisdiction over them. Rather, they appear here specially to contest and oppose Bayer Corporation's motion for a permanent injunction over their request that a West Virginia court certify a West Virginia class.

I. Federalism, Comity, and the Anti-Injunction Act

The doctrines of federalism and comity are ones that are well entrenched in our jurisprudence. When the founders of our nation met in Philadelphia over two hundred years ago, they wisely declined to have the new federal government usurp the entirety of the new nation's governmental functions.

> [T]he notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to

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aware of this Court's denial of class certification until being contacted by counsel for Bayer Corporation seeking available dates for the hearing on their motion for an injunction.

> describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideas and dreams of "Our Federalism."

Younger v. Harris, 401 U.S. 37, 44 (1971); *see also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-04 (1982) ("Ours is a union of states, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it."). Recognizing this fact, the legislative and judicial branches of our federal government have strove to respect the legitimate roles of state courts in our federal system.[2]

One consequence of this system is that sometimes litigation involving similar parties and events proceeds concurrently in state and federal courts. The United States Supreme Court has long recognized that parallel state and federal litigation do not cause jurisdictional interference requiring action:

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[2] *See* 28 U.S.C. § 2283 (Anti-injunction Act); 28 U.S.C. § 1738 (full faith and credit act); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (lower federal courts have no statutory authority to directly or indirectly review state court judgments); *Pennzoil Co v. Texaco, Inc.*, 481 U.S. 1, 11 n. 9 (1987) (abstention doctrines "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes"); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996) (giving full faith and credit to national class settlement approved by state court in which claims released included claims cognizable only in federal court.

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane . . . ."

* * *

. . . [A]n action brought to enforce [a personal] liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become

> generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. . . .

Kline v. Burke Construction Co., 260 U.S. 226, 229-30 (1922) (quoting *Covell v. Heyman*, 111 U.S. 176, 182 (1884)).

As the Supreme Court explained in *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 286 (1970):

> Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9, 60 S.Ct. 215, 218, 84 L.Ed. 537 (1940), it was necessary to work out lines of demarcation between the two systems. Some of these limits were spelled out in the

> [Judiciary Act of 1789, 1 Stat. 73]. Others have been added by later statutes as well as judicial decisions. The 1793 anti-injunction Act was at least in part a response to these pressures.

Accordingly, the Anti-Injunction Act generally prohibits federal courts from interfering with proceedings in the state courts. The present version of the Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283 (1970).

> On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. . . . Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the United States Supreme] Court.

Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng., 398 U.S. at 286-87 (also holding that "a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is." 398 U.S. at 294-95). *Accord Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-50 (1988).

> Congress, however, has permitted injunctions in certain, specific circumstances, namely, when expressly authorized by statute, necessary in aid of the court's jurisdiction, or necessary to protect or effectuate the court's judgment. These exceptions are designed to ensure the effectiveness and supremacy of federal law. But as the Court has recognized, the exceptions are narrow and are "not [to] be enlarged by loose statutory construction." . . .

Chick Kam Choo v. Exxon Corp., 486 U.S. at 146 (quoting *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. at 287).

Indeed, the Supreme Court has cautioned:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit

> wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng., 398 U.S. at 297.[3]

Accordingly, the mere existence of a parallel lawsuit in state court that seeks to litigate the same *in personam* action is not in itself sufficient grounds for the federal court to stay the state proceedings. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977). "[I]nefficient simultaneous litigation in state and federal courts on the same issue" is "one of the costs of our dual court system." *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524-25 (1986).

II. The Relitigation Exception and Collateral Estoppel Does Not Support an Injunction in this Case

The United States Court of Appeals for the Eighth Circuit has held:

> While the relitigation exception to the Anti-Injunction Act provides a justification for disregarding the Anti-Injunction Act, a federal court must also possess positive authority to issue an injunction against state court proceedings. The All Writs Act provides this authority, and empowers a federal court to

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[3] The Anti-Injunction Act cannot be evaded by directing the injunction against the parties to the action rather than against the state court. *Atlantic Coastline*, 398 U.S. at 287.

> protect the res judicata and collateral estoppel effects of its prior judgments by enabling it to "issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998) ("If an injunction falls within one of [the exceptions to the Anti-Injunction Act], the All-Writs Act provides the positive authority for federal courts to issue injunctions of state court proceedings.").

Canady v. Allstate Ins. Co., 282 F.3d 1005, 1019-20 (8th Cir. 2002).

The All-Writs Act provides, in relevant part, that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1988).

> The plain language of the All Writs Act establishes the permissive, non-mandatory, nature of the court's power to issue an injunction. *See* 28 U.S.C. § 1651(a) (stating that "courts . . . *may* issue all writs") (emphasis added). So too is the relitigation exception to the Anti-Injunction Act. *See Brooks[v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir. 1986)] (explaining that the Anti-Injunction act *allows* courts to issue injunctions in certain circumstances). . . .

Bailey v. State Farm Fire and Casualty Co., 414 F.3d 1187, 1189 (10th Cir. 2005).

The United States Supreme Court held in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-68, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978), that an order refusing to certify, or decertify, a class action is not a final judgment and may not be appealed as such. Recognizing such ruling, the Eighth Circuit in *Canady* "recognize[d] that denial of class certification alone does not constitute a final judgment on the merits sufficient to satisfy the res judicata principles underlying the relitigation exception to the Anti-Injunction Act." *Canady*, 282 F.3d at 1019 n. 9 (*citing Coopers & Lybrand, supra*; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., supra*; *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176 (5th Cir. 1996)).

While it is true that this Court's decision denying class certification in *McCollins v. Bayer Corp.*, et al., No. 02-0199, became appealable following the entry of final judgment on Bayer Corporation's motion for summary judgment, such factor does not in this case entitle Bayer Corporation to an injunction. Two of the cases favorably cited by the Eighth Circuit in *Canady* are of particular relevance to this issue. In *J.R. Clearwater Inc. v. Ashland Chem. Co., supra*, after noting that "[a]n order denying class certification is not a final judgment, and therefore is not appealable as a matter of right until conclusion of the litigation in the district court[,]" *id.*, 93 F.3d at 179, the United States Circuit Court of Appeals for the Fifth Circuit held:

> While we are given to understand by correspondence from counsel that a final judgment was subsequently entered by the district court one month after this case was

argued before this panel, that does not change our disposition of the present appeal, given the discretionary nature of the class certification determination generally.

The denial of class certification is "a procedural ruling, collateral to the merits of a litigation. . . . ," *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336, 100 S.Ct. 1166, 1173, 63 L.Ed.2d 427 (1980), and the decision as to whether to certify a class lies within the "wide discretion" of the trial court. *Shipes v. Trinity Ind.*, 987 F.2d 311, 316 (5th Cir.), *cert. denied*, 510 U.S. 991, 114 S.Ct. 548, 126 L.Ed.2d 450 (1993); *see also,* 7B Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, § 1785 at 119 (court has "broad discretion"). While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, *see American Exp. Travel Related Services Co. v. Walton*, 883 S.W.2d 703, 708 (Tex.App.-Dallas 1994, no writ); *Ventura v. Banales*, 905 S.W.2d 423, 425 (Tex.app.-Corpus Christi 1995, no writ), a Texas court might well exercise this discretion in a different manner. It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court-or at least each jurisdiction-be free to make its own determination in this regard. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, § 4434 at 327 ("If preclusion is to be denied, it should be on the ground that many procedural matters may be so far discretionary

> that a second court should be free to make its own determination."). This reasoning is particularly applicable when matters of state-federal relations are involved as in the present case in which an injunction would impinge upon the state court's ability to exercise discretion in the administration of its own docket contrary to the policies underlying the Anti-Injunction Act.
>
> The element of discretion that inheres in this class certification determination must be emphasized. Indeed, one Texas court applying the federal collateral estoppel rules concluded that collateral estoppel did not bar relitigation of the class certification issue in part because even those aspects of the state class action rule which are identical to the federal rule have sometimes been applied differently by the state courts. *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360, 368 (Tex.App.-Houston (14th Dist.) 1994, no writ). Therefore, the Texas court concluded that the identity of issues necessary to collateral estoppel was lacking.
>
> For the foregoing reasons, we conclude that the district court did not err in denying Ashland's motion to enjoin relitigation of the class certification in state court. . . .

J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d at 180 (footnote omitted).

Similarly, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., supra,* after stating that "denial of class certification is not a 'judgment' for the purposes of the Anti-Injunction Act

while the underlying litigation remains pending[,]" *id.* at 146, the United States Circuit Court of Appeals for the Third Circuit also held:

> [T]he decision by this Court to reject the provisional settlement class is not a "judgment" with respect to the Louisiana settlement agreement, and our interpretation of Rule 23 is not binding on the Louisiana court. . . . Moreover, our construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23. Rather, the Louisiana court properly applied La.Code Civ. Proc. Ann. Arts. 591 and 592, the parallel Louisiana class certification rule.
>
> Since appellants have failed to show that an exception to the Anti-Injunction Act under these circumstances was either expressly authorized by Congress, necessary in the aid of the MDL court's jurisdiction, or necessary to protect or effectuate a final judgment of the MDL court, neither this Court nor the district court has the authority to enjoin the Louisiana proceedings.

In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 134 F.3d at 146 (footnote omitted). *Accord Allen v. Stewart Title Guaranty Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 ("In the instant action, the issues before the Court of Common Pleas for Philadelphia County are not identical to the issues before this court, because the rules regarding class certification are different. . . . The rules regarding class action are substantially similar under Pennsylvania Rule of Civil Procedure 1702 and

Federal Rule of Civil Procedure 23, however, as in Texas, a Pennsylvania court may exercise its discretion regarding class certification in a different manner than a federal court. Since the discretion that is inherent in class certification decisions permits a state court to consider a motion for class certification despite a federal court's decision denying class certification, the reverse is also true, and a federal court is permitted to consider such a motion. Therefore, the court concludes that the matters are not identical, and the doctrine of collateral estoppel does not apply." (footnote omitted)).

Bayer Corporation's contention that any differences between Rule 23 of the Federal Rules of Civil Procedure and Rule 23 of the West Virginia Rules of Civil Procedure are illusory is, itself, fiction. It's falsity is readily revealed by merely recognizing that while this Court applying Fed.R.Civ.P. 23 denied class certification of an economic-loss claim based on breach of express and implied warranties and violation of the West Virginia Consumer Credit and Protection Act involving a pharmaceutical product, the West Virginia Supreme Court of Appeals applying W.Va.R.Civ.P. 23 has found such an economic-loss claim involving a pharmaceutical product to be properly certified as a class action in *In re West Virignia Rezulin*, 585 S.E.2d 52 (W.Va. 2003) (reversing circuit court's denial of class certification).

Accordingly, for all of the above reasons, the relitigation exception to the Anti-Injunction Act and the doctrine of collateral estoppel do not support Bayer's request for an injunction.

III. This Court Lacks Personal Jurisdiction over Respondents And the Class They Seek to Represent

As noted above, respondents appear specially in this case. They do not consent to personal jurisdiction in this Court and, with all due respect, object to the Court exercising personal jurisdiction over them or the class they seek to represent.

As a preliminary matter, it is important to recognize that neither the Anti-Injunction Act nor the All-Writs Act satisfy the jurisdictional prerequisites of subject-matter jurisdiction and personal jurisdiction. In *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31-34 (2002), the United States Supreme Court held that the All-Writs Act did not give a federal court authority to remove a state-court case in order to prevent frustration of orders a federal court had previously issued, and that removal was only proper if the federal court independently would have had original subject-matter jurisdiction over the state-court case. "Section 1441 requires that a federal court have orginal jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement." *Id.*, at 34.[4]

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[4] Accordingly, the Eighth Circuit's holding to the contrary in *Canady*, 282 F.3d at 1012-13, is no longer valid law on such issue and this Court cannot ignore the differences in between federal and state procedural rules as the court did in *Canady*, 282 F.3d at 1016-17 & 1019.

As to personal jurisdiction, the Third Circuit Court of Appeals in *Carlough v. Admiral Ins. Co.*, 10 F.3d 189, 198 (3d Cir. 1993), explained:

> We note that neither the Anti-Injunction Act, 28 U.S.C. § 2283 (1970), nor the All-Writs Act, 28 U.S.C. § 1651 (1988), dispels the federal court's jurisdictional requisite or divests the West Virginia court of its jurisdiction to adjudicate the *Gore* action, but rather the judicial authority extended by the Acts is wholly derivative in nature. Thus the application of the Anti-Injunction and All-Writs Acts should have been *preceded* by the satisfaction of jurisdictional prerequisites. *See Atlantic Coast Line R. R. Co. v. Brotherhood of Locomotive. Engineers*, 398 U.S. 281, 287, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970) (exceptions to § 2283 should not be enlarged by liberal statutory construction).

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the United States Supreme Court acknowledged that "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 805, 105 S. Ct. at 2971. The Court further agreed that "a chose in action is a constitutionally recognized property interest possessed by each of the [absent class-action] plaintiffs." *Ibid.*, 472 U.S. at 807, 105 S.Ct. at 2972. Addressing what due process rights must be afforded an absent class-action plaintiff, the Court held:

Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter. The Fourteenth Amendment does protect "persons," not "defendants," however, so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane, 339 U.S., at 314-315, 70 S.Ct., at 657; cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175, 94 S.Ct. 2140, 2151, 40 L.Ed.2d 732 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by

> executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Hansberry*, 311 U.S., at 42-43, at 61 S.Ct., at 118-119, 120.

Id., at 811-12, at 2974. *See Carlough*, 10 F.3d at 199-200 (explaining the analysis).

These West Virginia respondents know of no basis for this Court to assert personal jurisdiction over them under the facts and circumstances of this case. If the above requirements exist for absent class-action plaintiffs in a case where class certification is granted, how in all fairness can there be no due process requirements for absent class-action plaintiffs where class-action certification has been denied in a prior action? Respondents note that numerous courts have refused to recognize the existence of personal jurisdiction in such a situation. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 141 ("But here, in the wake of our judgment in *GM I*, there is no class pending before the MDL court, and thus, virtually none of the 5.7 million class members in Louisiana are before this Court in any respect, and there is no basis upon which we can infer their consent. . . . To be more precise, the Louisiana class members are not parties before us; they have not constructively or affirmatively consented to personal jurisdiction; and they do not, as far as has been demonstrated, have minimum contacts with Pennsylvania. Therefore, due process deprives us of personal jurisdiction and prevents us from issuing the injunction prayed for by appellants." (footnote

omitted)); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006) ("Here, the district court refused to grant class certification in the Bayshore Action . . . Once this decision was made, Westgate became a stranger to the Bayshore Action. . . . The denial of class certification limited the court's *in personam* jurisdiction solely to the parties appearing before it, namely the Bayshore Dealers and Ford. Consequently, the denial could not have been binding on Westgate." (citation and footnote omitted)).

To the extent that Bayer Corporation wishes to rely upon *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003), to support the injunction in this case, respondents submit that its holding is contrary to the above cases and not well reasoned in light of the purposes and strict construction of the Anti-Injunction Act and All-Writs Act. In any event, however, under the facts of this case, even *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.* would not support granting an injunction. In that case the court held that "[a] decision with respect to the class is conclusive only if the absent members were adequately represented by the named litigants and class counsel." 333 F.3d at 768-69.

In the present case, no express finding was made by the Court on such issue. Rather, for purposes of its analysis, this Court assumed adequate representation without deciding the issue. Respondents submit that adequate representation cannot be reasonably or properly found in this case, because counsel failed to appeal the denial of class certification to the Eighth Circuit once a final judgment was entered and, if needed, to seek review by the United States Supreme Court.

Accordingly, for all of the foreging reasons, there is no legitimate and valid basis for the assertion of personal jurisdiction over respondents in this matter.

IV. Conclusion

For all of the foregoing reasons, respondents request that Your Honorable Court deny Bayer Corporation's motion for an injunction.

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[Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/SRN)

Case No. 02-0199

[Filed November 24, 2008]

In re BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to:	)
	)
Black, et al. v. Bayer Corp., et al.	)
	)

REPLY IN SUPPORT OF BAYER CORPORATION'S EXPEDITED MOTION FOR A PERMANENT INJUNCTION

Keith Smith and Shirley Sperlazza do not dispute:

- that they were absent members of the putative class in *McCollins*; or

- that they are asking a West Virginia state court to certify the same West Virginia economic loss class this Court refused to certify in *McCollins*; or

- that their principal argument for certifying that putative class is the same one rejected in *McCollins*: that plaintiffs need not prove that they were harmed by or did not benefit from

> Baycol, so individual issues cannot predominate.

Rather, Mr. Smith and Ms. Sperlazza assert that they – and presumably other absent class members – are entitled to relitigate the issue of class certification *ad infinitum* because (1) absent class members are not bound by a decision denying class certification and (2) another court might decide the issue differently.

This Court should reject Mr. Smith and Ms. Sperlazza's arguments and grant the injunction requested by Bayer. As demonstrated below, these absent class members are subject to this Court's jurisdiction. They have no authority for the proposition that where, as here, a federal court's final judgment denying class certification turns on a substantive question of law, absent class members may collaterally attack that ruling by relitigating the issue in another court.

I. THE COURT'S DENIAL OF CLASS CERTIFICATION IS BINDING *IN PERSONAM* ON MR. SMITH AND MS. SPERLAZZA.

Mr. Smith and Ms. Sperlazza contend that they cannot be enjoined because they have not consented to this Court's jurisdiction. Pl. Opp. at 1. However, a denial of class certification is "binding *in personam* with respect to the unnamed class members." *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003). As the Seventh Circuit explained, "unnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them." *Id.* at 768.

As Bayer explained in its opening brief, the question, for purposes of due process, is whether the absent class members were adequately represented. *See* Def. Br. at 14-16 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995)). Mr. Smith and Ms. Sperlazza do not address this issue until the final page of their brief, where they complain (in a single sentence) that Mr. McCollins did not appeal this Court's final judgment. Pl. Opp. at 15.

However, a decision not to appeal does not, in and of itself, render a class representative inadequate. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390-91 (9th Cir. 1992). As Bayer demonstrated in its opening brief, Mr. McCollins adequately represented the interests of absent class members in litigating the dispositive issue on class certification: whether individual plaintiffs must each prove that they were injured by or did not benefit from Baycol. Def. Br. at 14-16. Mr. Smith and Ms. Sperlazza have not identified any way in which Mr. McCollins' interests conflict with theirs. Nor can they make such a showing because all three putative class representatives are similarly situated; Mr. Smith and Ms. Sperlazza – like Mr. McCollins – have no evidence they were injured by Baycol and, in fact, they benefited from the medicine. *Id.* at 15. Moreover, Mr. Smith and Ms. Sperlazza do not challenge the vigor with which Mr. McCollins argued for class certification, pressing the identical argument they now seek to present to a West Virginia state court judge. *See id.* at 8-9. They have not even identified a supposed error in this Court's judgment that would provide grounds for an appeal. *See* Pl. Opp. at 15.

Accordingly, their unsupported suggestion that Mr. McCollins should have appealed does not provide grounds for challenging his adequacy as a class representative.

Mr. Smith and Ms. Sperlazza nevertheless argue that they cannot be bound by this Court's order because they did not receive notice or an opportunity to opt out of the putative class. *See id.* at 12-13.[1] They rely upon *Shutts*, in which the Supreme Court held that absent class members cannot be bound to a decision on the merits in an action for damages unless they receive notice and the opportunity to opt out of the class. *See Shutts*, 472 U.S. at 806-14. But *McCollins* did not purport to decide the merits of the claims of absent class members and Bayer is not making such an argument. Mr. Smith and Ms. Sperlazza are free to pursue their individual claims. *See, e.g., Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1018 (8th Cir. 2002) (enjoining relitigation of class claims, but recognizing the continuing viability of individual claims). The sole issue here is whether Mr. Smith and Ms. Sperlazza may relitigate class certification. As the Seventh Circuit observed, "no statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step." *In re Bridgestone/Firestone*, 333 F.3d at 769.

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[1] Mr. Smith and Ms. Sperlazza's claim that they were unaware of the *McCollins* decision is inconsistent with their counsel's prior representations to Bayer. That counsel is a leading West Virginia plaintiffs class litigation firm, which has had several cases pending in this MDL. The suggestion that this firm would have no knowledge of a putative West Virginia class action in this Court is dubious at best.

Ultimately, Mr. Smith and Ms. Sperlazza base their jurisdictional challenge on *dicta* from *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233 (11th Cir. 2006), and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998). But those cases are distinguishable. In *In re Bayshore*, the class representative in the first action was expressly held inadequate. *See* 471 F.3d at 1245. In *In re General Motors*, the Third Circuit decertified a class in the first action because the district court had failed sufficiently to articulate the bases for granting class certification. *See* 134 F.3d at 139, 146. By contrast, this Court never judged Mr. McCollins an inadequate class representative, and Mr. Smith and Ms. Sperlazza have not demonstrated that Mr. McCollins failed adequately to represent their interests in pursuing class certification. Moreover, this Court's decision in *McCollins* provides an explicit ruling on a point of law that precludes litigation of these economic loss claims on a classwide basis.

In short, Bayer has established that Mr. McCollins adequately represented the interests of Mr. Smith and Ms. Sperlazza in seeking certification of economic loss claims. Mr. Smith and Ms. Sperlazza have not made a contrary showing. Accordingly, this Court has jurisdiction to enjoin Mr. Smith and Ms. Sperlazza from relitigating certification of a West Virginia economic loss class.

II. MR. SMITH AND MS. SPERLAZZA MAY NOT RELITIGATE IN STATE COURT THIS COURT'S FINAL JUDGMENT DENYING CLASS CERTIFICATION.

Mr. Smith and Ms. Sperlazza contend that they are entitled to relitigate class certification for two additional reasons. First, they argue that class certification orders are not final judgments and therefore not entitled to preclusive effect. Pl. Opp. at 6-8. Second, they assert that identity of issues is absent, because a West Virginia state court might decide to certify a class. *Id.* at 8-11. Neither argument withstands examination.

A. Because Final Judgment Has Been Entered in *McCollins*, This Court's Decision Precludes Relitigation of Class Certification.

Mr. Smith and Ms. Sperlazza argue at some length that the relitigation exception to the Anti-Injunction Act does not apply because an order denying class certification is not a final order entitled to preclusive effect. *See* Pl. Opp. at 7 (citing *Canady*, 282 F.3d at 1019-20; *In re General Motors*, 134 F.3d at 146; *J.R. Clearwater Inc. v. Ashland Chemical Co.*, 93 F.3d 176, 180 (5th Cir. 1996)). This argument is beside the point because, as Mr. Smith and Ms. Sperlazza concede (Pl. Opp. at 7), this Court entered final judgment in *McCollins*. Indeed, in the Eighth Circuit case upon which Mr. Smith and Ms. Sperlazza principally rely, the Court *affirmed* an order enjoining relitigation of a class certification decision where a final judgment had issued. *See Canady*, 282 F.3d at 1017.

B. Mr. Smith and Ms. Sperlazza Are Not Entitled To Relitigate Class Certification in the Hope That a West Virginia Court Will Exercise Its Discretion Differently Than This Court.

Ultimately, Mr. Smith and Ms. Sperlazza rely on the "heads-I-win, tails-you-lose" argument that plaintiffs may relitigate class certification because different courts may follow different procedures and may exercise their discretion differently. *See* Pl. Opp. at 7-10 (citing *J.R. Clearwater*, 93 F.3d at 179-80; *In re General Motors*, 134 F.3d at 146; *Allen v. Stewart Title Guaranty Co.*, No. 06-cv-2426, 2007 WL 916859, at *1-2 (E.D. Pa. Mar. 20, 2007)). This argument fails for two reasons.

1. The Court of Appeals decisions upon which Mr. Smith and Ms. Sperlazza rely do not apply to the facts here. Those opinions emphasized that class certification decisions ordinarily are matters of judicial discretion, controlled by local procedural rules. *See J.R. Clearwater*, 93 F.3d at 180 ("The element of discretion that inheres in this class certification determination must be emphasized"); *In re General Motors*, 134 F.3d at 146 ("our construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23"); *Allen*, 2007 WL 916859, at *1-2 (relying exclusively on *J.R. Clearwater* and *In re General Motors*).

However, as the Seventh Circuit emphasized, in a decision post-dating both *In re General Motors* and *J.R. Clearwater*, class certification decisions may have

both procedural and substantive components. *See In re Bridgestone / Firestone*, 333 F.3d at 768 ("Determining the permissible scope of litigation is as much substantive as it is procedural"). That is the case here, where this Court's decision to deny class certification was driven by a conclusion of law – that plaintiffs must individually prove that they were injured by or did not benefit from Baycol. Def. Br. Ex. A at 9-12. In seeking to relitigate class certification in a West Virginia state court, Mr. Smith and Ms. Sperlazza are not simply asking that court to exercise its discretion differently. They want that court to *de facto* overrule a decision of law made by this Court. *Id.* Ex. F at 21-24 (claiming common issues predominate over individual issues in economic loss claims under West Virginia law, "with respect to liability, there are no individual issues"). None of the cases upon which Mr. Smith and Ms. Sperlazza rely suggests that absent class members may relitigate such a determination.

To the extent that there is any tension with *J.R. Clearwater* and *In re General Motors*, Mr. Smith and Ms. Sperlazza ignore that the Eighth Circuit agrees with the reasoning of *In re Bridgestone / Firestone*. In *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 219 (8th Cir. 1977), the Eighth Circuit recognized that "a plaintiff ought not to have unlimited bites at the apple" in seeking certification, and that repeated pursuit of the same relief "is wasteful and runs counter to the sound administration of multi-district cases." *See also Canady*, 282 F.3d at 1018 (enjoining relitigation of class claims, "What appellants may not do is recycle the same claims and issues in different courts, hoping to achieve a result they desire"). That would certainly be the case here, where Mr. Smith and Ms. Sperlazza intend to

relitigate the same dispositive issue of law in another court.

2. Mr. Smith and Ms. Sperlazza's reliance on **In re West Virginia Rezulin** *is misplaced.* Mr. Smith and Ms. Sperlazza point to *In re West Virginia Rezulin* to support their argument that federal and state courts take a different view on certification of West Virginia economic loss claims. Pl. Opp. at 10-11. This Court is, of course, thoroughly familiar with *In re West Virginia Rezulin*, having applied the decision in adjudicating the claims of West Virginia plaintiffs and considering the propriety of a nationwide class. *See, e.g., McCollins* (Def. Br. Ex. A) at 16-19 (applying *In re West Virginia Rezulin* in *McCollins*); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 204 (D. Minn. 2003) (considering *In re West Virginia Rezulin* in connection with motions to certify nationwide classes); *see also Ballard v. Bayer Corp.*, No. 03-5984 (Def. Br. Ex. H) at 20-23 (applying *In re West Virginia Rezulin*).

Mr. Smith and Ms. Sperlazza's invocation of *In re West Virginia Rezulin* fails to account for key differences between that case and *McCollins*. Most importantly, *In re West Virginia Rezulin* rejected only the argument that individual issues of ***damages*** predominated over common issues of fact with respect to the economic loss claims asserted. *See In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 74-75, 585 S.E.2d 52, 74-75 (W. Va. 2003). In contrast, this Court's ruling in *McCollins* held individual issues of medical causation – *i.e.*, "whether Baycol benefited or harmed any particular person" (Def. Br. Ex. A at 12) – not merely damages, predominated. In short, contrary to Mr. Smith and Ms. Sperlazza's suggestion, *In re West Virginia Rezulin* does not provide a basis for

allowing them to relitigate this Court's class certification decision.

* * *

For the foregoing reasons, as well as those set forth in Bayer's Memorandum in Support of Expedited Motion for a Permanent Injunction, the Court should issue an Order pursuant to Federal Rule of Civil Procedure 65 and its statutory authority under 28 U.S.C. §§ 1651 and 2283 permanently enjoining Keith Smith and Shirley Sperlazza from seeking certification of an economic loss class of West Virginia Baycol purchasers in the lawsuit styled *Keith Smith, et al. v. Bayer Corp.*, No. 01-C-191 (Cir. Ct. Brooke Co., W. Va.).

Dated: November 24, 2008

Respectfully Submitted,

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[*Certificate of Service Omitted in Printing of this Appendix*]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/JGL)

[Filed November 22, 2002]

In re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to All Actions	)
	)

Pretrial Order No. 51

1. A settlement/mediation program established and directed by this Court promotes and meets its duties and responsibilities under 28 U.S.C. Section 1707, et seq. and as an MDL court and assists in the settlement, the preparation for trial, and the trial of cases to be transferred back to transferor courts.

2. This Court establishes the Baycol MDL Settlement and Mediation Program "Settlement Program" to provide opportunities for all parties and their lawyers for transferred MDL cases, for federal cases awaiting to be transferred, and for any other Baycol case or claim voluntarily submitted for settlement and/or mediation under this Settlement Program.

3. Special Master Roger Haydock and two lawyers appointed by the plaintiff lawyers and two lawyers appointed by the defense lawyers and one lawyer appointed by the Court shall promptly develop the Settlement Program and its proceedings subject to

approval of this Court and shall recommend mediators to be appointed by this Court and a fee schedule for the costs and expenses associated with the Settlement Program.

4. Special Master Haydock shall operate the Settlement Program with the assistance of staff and court appointed mediators.

5. No party, person, or entity shall call or subpoena the Special Master or the lawyers designated in Paragraph 3 testify or produce any notes or documents related to the Settlement Program in any civil action or proceedings of any kind whatsoever. If called or subpoenaed, the Special Master and lawyers may refuse to testify or produce notes or documents. Any party, person, or entity that attempts to compel such testimony or production will be liable for and shall indemnify the Special Master and the lawyers against any liabilities, costs, and expenses, including reasonable attorney fees, which may be incurred in resisting such compulsion.

Date: 11-22-02

/s/Michael J. Davis
Michael J. Davis
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431

[Filed February 13, 2003]

In Re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates to All Actions	)
	)

Pretrial Order No. 63

The parties and lawyers in the MDL Baycol Litigation and in many state court cases have been coordinating discovery efforts and working together to agree to the protocol for the taking of depositions of Bayer representatives in Europe or elsewhere. Members of the Liaison Advisory Committee of this Court have submitted a protocol for inclusion in a pretrial order. This Court has reviewed the proposed protocol and incorporates such protocol herein. IT IS HEREBY ORDERED:

Plaintiffs and Defendants (the "Parties") have agreed to the following protocol ("Deposition Protocol") for the depositions of Bayer AG witnesses. To the extent that this deposition protocol is inconsistent with Pretrial Order No. 7 in the MDL Proceedings (MDL No. 1431) or the applicable Order in the Philadelphia and California coordinated proceedings, the procedures set forth in this Deposition Protocol shall govern the depositions of the Bayer AG witnesses.

1. Location & Schedule: The depositions will be held at the International Dispute Resolution Center located on Chancery Lane in London, England or at such other location on which the Parties may agree, in accordance with the schedule agreed to by the Parties.

2. Logistics & Scheduling: The Parties agree to arrange for a room for each deposition that will accommodate approximately 40 to 50 people. Matters of seating arrangement for the witness and counsel shall be decided by agreement of the principal attorney conducting the examination of the witness and counsel for the witness. Two breakout rooms will also be available for each side (that is, plaintiffs' side and defendants' side) to hold private meetings. The depositions will take place in two sessions. The first session will run from February 24, 2003, to March 5, 2003, on a single track ("First Session"). The second session will run from March 24, 2003, to April 5, 2003 on a dual track ("Second Session").

3. Time Allocation, Format and Order of Depositions: Each deposition will take no more than eight and one-half (8 1/2) hours per day commencing at 9:00 a.m. and ending at 5:30 p.m. (GMT), with a (1) one hour lunch break at or around 12:00 noon and breaks totaling about 30 to 45 minutes per day, for a three-day period. The depositions will proceed in the following order and format:

a. Segment 1: Discovery examination – Plaintiffs Side (8 hours)

b. Segment 2: Direct examination – Bayer Defendants Side (6 hours)

c. Segment 3: Further examination – Plaintiffs Side (8 hours)

Segment 1 will commence at 9:00 a.m. on the first day and shall continue until 5:30 p.m. that day as well as for one (1) hour at the beginning of the second day. Segment 2 will commence at the conclusion of Segment 1 and shall proceed no longer than six (6) hours. Segment 3 shall commence at the conclusion of Segment 2 and shall proceed until 5:30 p.m. on the second day and on into the third day for the time remaining from the Plaintiff's Further Examination allotment of time. Out of the time allotted to a Side per segment, each Side may reserve time for examination of a witness at the completion of any segment.

To insure that each deposition adheres to the allotted time, each side may employ no more than two attorneys per examination segment. However, both attorneys will have the right to examine the witness provided that the questioning is not duplicative and that each examining attorney questions the witness only for one period of time during the segment. In the instance where a deposition requires translation for the witness, although the Parties agree to use their best efforts to complete the depositions in accordance with the schedule set forth in Appendix A, the Parties recognize that extra time to complete the deposition may be necessary to compensate for time needed in translation. Accordingly, the Bayer AG witnesses testifying in German will be available for examination, if requested, for one additional day to be scheduled upon mutual agreement of the Parties during the Second Session.

4. Court Reporters: The plaintiffs may choose a certified court reporting service to record each deposition. However, plaintiffs will rotate a different court reporter for each of the two sessions.

The court reporter will utilize a real time transcription displayed on video or computer monitors.

5. Interpreters/Translators: In those instances where a witness chooses to respond to questions in his or her native language (other than English), a neutral translator will be employed to interpret and translate from the foreign language to English. Each translator will swear under oath prior to each deposition to provide honest and truthful translations.

Two translators will be employed for the First Session and three translators for each deposition during the Second Session. The translators will rotate as necessary during the course of the depositions. A monitor displaying "real time" transcription will be placed in front of the translator to assist in the translation. Translators will be compensated on a daily basis for those days spent actually translating. Translators will also be reimbursed for ordinary and necessary expenses.

Defendants and plaintiffs will share the fees and costs of the translators equally.

6. Advance Notice of Documents Used in a Deposition: Each party will provide to the other party advance notice of all German documents each reasonably anticipates using in an examination (except for impeachment), by serving such documents 72 hours in advance of a deposition. Each party representing a

witness will bring to the deposition any document reviewed by the witness in preparation for the deposition. Each party will appoint a liaison to receive such documents.

7. Advance Notice of Language of Witnesses: Defendants will notify plaintiffs of all witnesses who will be deposed in German and therefore, who will require the assistance of translators, no later than February 15, 2003.

8. Objections: All objections shall be reserved for trial, other than objections to the form of the question (which also encompasses leading questions) or responsiveness of the answer. This paragraph is not intended to preclude any party from seeking a ruling in accordance with paragraph 9.

9. Court Intervention to Resolve Disputes: The Honorable Michael Davis or Special Master Roger Haydock or another Master appointed by Judge Davis shall preside at the depositions of the Bayer AG Witnesses and rule on any matters arising at the depositions. The Court will pay its own costs for attending the depositions. The Parties agree to share equally the costs incurred by the Master in attending the depositions.

10. Deposition Notices and Cross Notices: Plaintiffs will notice all depositions and serve such notices on all parties in cases pending in the MDL and the Philadelphia and California coordinated proceedings ("State Coordinated Proceedings") pursuant to the procedures currently being followed prior to all Baycol AG depositions. Defendants may cross notice depositions in any other cases involving

Baycol. The parties agree that the procedures for noticing the depositions of the Bayer AG witnesses shall be in accordance with the procedures used by the MDL and the State Coordinated Proceedings in noticing Bayer Corp. witnesses and that the parties need not institute proceedings under the Hague Convention for the taking of these depositions.

11. Evidentiary Form of Questions: In the event the parties seek to use at any trial the deposition testimony of any witness offering an opinion, the parties agree not to raise at such deposition or trial the objection that the deposition questions asked or the answers given regarding such expert opinion do not conform to the evidentiary form typically required by the jurisdiction whose law would control the case being tried. For example, if one jurisdiction requires an opinion to be expressed to a reasonable degree of certainty, the defendants shall not object to an opinion given to a reasonable degree of probability.

12. Party Liaison: Each party will appoint a liaison to serve at each session of the depositions to ensure proper compliance with the protocol in seeking intervention of the court to assist courts in resolving disputes; to assist with the logistics of the protocol; and, to ensure that decorum is met in the overall deposition process.

13. Telephone Participation: Telephone facilities will be provided so that parties wishing to participate in the depositions by telephone may do so.

14. Good Faith: The parties agree to attempt to resolve all issues arising during the course of the

depositions of the Bayer AG witnesses amicably and in good faith.

Date: 2/13/03

/s/Michael J. Davis
Michael J. Davis
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD/JGL)

[Filed February 23, 2004]

In re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates To:	)
	)
All Actions	)
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THE PARTIES' STATUS REPORT AND PROPOSED AGENDA

February 24, 2004

The parties herewith submit the following Joint Status Report and Agenda for the hearing on February 24, 2004.

I. Pending Cases

A. As of close of business on February 17, 2004, defendants have been served with 9,691 cases that remain active. Of that total, 6,219 cases are pending in federal court and 3,470 cases are pending in state court. At last count, the number of claimants excluding spouses exceeds 22,000 individuals; the exact number is not known. Filed but unserved cases are not included in these totals. The totals also exclude 657 cases in which dismissal is pending.

B. As of the last status conference in January, 2004, defendants had been served with 9,943 cases that were active. Of that total, 6,225 cases were pending in federal court and 3,718 cases were pending in state court. Filed but unserved cases were not included in these totals. The totals also excluded 551 cases in which dismissal was pending.

C. An updated list of plaintiffs' counsel in pending cases has been provided to the PSC.

II. Settlement

A. To date, Defendants have settled 2,179 cases with a total value of $826,799,707. Of this total, 596 cases have been determined to be subject to the MDL assessment, with a total value of $211,707,847.

B. As of the January status conference, Defendants had settled 2,059 cases with a total value of $782,056,734. Of this total, 484 cases had been determined to be subject to the MDL assessment, with a total settlement value of $175,403,033.

C. Approximately 95 cases have been submitted to the MDL mediation process. The parties have provided the Court with letters regarding certain cases referred to mediation that have not settled. The PSC would like to discuss adjusting the mediation process to achieve greater value to the parties. Defendants have not received any proposal from the PSC.

D. In addition to the mediation program, the PSC is continuing to negotiate cases directly with Bayer.

E. Mediators' Report: Special Master Lew Remele.

III. Discovery

A. Document production by Bayer Corporation, Bayer AG, and GSK continues. On February 23, Bayer suggested to plaintiffs that document production be brought to a conclusion. Plaintiffs have not yet had an opportunity to respond. In addition, a problem with the quality of certain produced documents was brought to Bayer's attention. Bayer is responding to correct this problem. On February 20, Bayer produced 32 new CDs of documents. These CDs contained materials attributable to a number of individuals already deposed in Europe by the PSC (e.g. Ebsworth, Mueck, Plischke, Von Keutz, Weidmann, Sprenger); these are new materials relevant to previously deposed, highly important individuals. The PSC is evaluating the documents and will communicate with Defendants.

B. Pursuant to PTO 99, defendants are reviewing documents previously marked as confidential to determine whether such documents should retain a confidentiality designation. Bayer expects to make its first production of dedesignated documents the week of February 23. The deadline for re-designation of documents is April 30, 2004. Production of such documents will be on a rolling basis.

C. Discovery is proceeding in cases being prepared under PTOs 89 and 96. The parties have provided the Court with reports on the status of the cases at issue in these PTOs. Plaintiffs have advised defendants that the last of the six Minnesota trial cases, *Pierce*, will not be presented to the Court as the first Minnesota case for trial. Discussions are in process with the plaintiff to ascertain this Plaintiff's desires concerning his case. The PSC will advise Defendants and the

Court as soon as these discussions with Mr. Pierce are concluded. Weitz and Luxenberg and Defendants are negotiating stipulations to dismiss a number of cases in which Weitz and Luxenberg has declined to schedule depositions; this is the subject of a motion by defendants if counsel cannot agree (*see* below).

D. The PSC has received copies of settlements reached with third party payor insurance carriers. The PSC has advised Plaintiffs counsel they may be entitled to a refund or no further withholding as to the settling insurance companies.

E. Generic expert reports have been exchanged and many generic experts have been deposed. Plaintiffs have provided "supplemental" or "rebuttal" reports or documents for 5 of their experts either close to the time of their depositions or after they were deposed. The parties are conferring about additional deposition dates for these witnesses.

F. Defendants believe that the withdrawal of the *Pierce* case creates an opportunity for conclusion of all generic expert discovery in the MDL and would like to discuss with the Court and plaintiffs a schedule for completion of such discovery and for *Daubert* motions. The PSC believes that PTO 96 already establishes this schedule and should be followed.

G. Plaintiffs have recently convened a conference at which all of their experts made videotaped presentations of their expert reports. This conference was pursuant to the Court's direction to prepare a science and medicine tutorial for the Court. Defendants have requested a copy of those videotapes,

as information on which plaintiffs' experts are relying. Plaintiffs have yet to respond.

IV. Motions

A. The following motions are fully briefed, have been submitted to the Court, and are ready for argument:

1. Defendants' Motion for Sanctions (Italian prosecutor matter)

2. Jurisdiction over Plaintiffs' Motion to Declare the Non-Existence of Medicare Liens

3. Defendants' Motion to Dismiss with Prejudice Certain Weitz cases (Weitz's position is that this motion is not ripe with respect to some plaintiffs. The parties are in discussions regarding this motion and will advise the Court of the status of those discussions on Tuesday.)

4. *Praytor v. Bayer Corp*, 02-453, motion for suggestion of remand of rhabdo case for trial

   (Judge Lebedoff will be mediating this case on February 24, at 9 am.)

B. Also fully briefed:

1. Plaintiffs' motion for an order governing dissemination of expert witnesses reports. (Defendants have filed a brief in response to the motion and proposed referral of the matter to the LAC. Neither plaintiffs nor

defendants seek argument with respect to this matter.)

2. Motion for PSC to participate in third party payor settlement negotiations (This matter was argued in December and is under consideration by the Court. The PSC subsequently filed a Notice of Lien on Third Party Payer Settlements, which Defendants have moved to quash. On February 24, 2004, plaintiffs responded to the Motion to Quash. Defendants would like these issues resolved on an expedited basis, since they impact defendants' settlement obligations with respect to third parties.)

C. PTO 102 and *Lone Pine*.

Extensive objections have been filed to PTO 102; defendants have requested that their fully-briefed *Lone Pine* motion be argued at this status conference, since it provides an alternate approach to the narrowing issues addressed in PTO 102. Plaintiffs object to argument of *Lone Pine* at this time. The parties are scheduled to meet with Special Master Haydock on February 23 and will provide an update to the Court. The following motions have been held in abeyance pending narrowing discussions:

1. PSC Motion to Modify PTO 89 and Schedule Summary Jury

2. Trials PSC Motion to Extend the Stay of PTO 61

3. Defendants' Motion to Transfer

D. The following motion has been referred to Magistrate Judge Lebedoff: Plaintiffs' Motion for Sanctions concerning Defendants' "detail-person" records (fully briefed)

V. Trial Settings

A. On February 22, plaintiffs advised defendants that the last of the original 6 Minnesota resident/Minnesota filed cases selected for possible trial, *Pierce*, would be withdrawn as the first case tried in the MDL. Consent of the client is still being obtained for final action on the matter.

B. The cases randomly selected by the Court under PTO 89 are in the deposition process. The parties have provided status reports to the Court.

C. A list of state court trial settings has been provided to the Court and the PSC.

D. The PSC has proposed an alternative plan for trial of cases under the auspices of the MDL Court. Defendants have not seen this plan.

VI. Liaison Advisory Committee/Special Masters' Report

Respectfully submitted,

_____

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Co-Lead Counsel
for Plaintiffs

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Adam Hoeflich
Susan Weber
Gene Schaerr
Peter Sipkins
Counsel for Bayer

Fred Magaziner
Tracy Van Steenburgh
Counsel for GlaxoSmithKline

* * *

[*Certificate of Service Omitted in Printing of this Appendix*]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MDL No. 1431
(MJD)

[Filed November 10, 2008]

In re: BAYCOL PRODUCTS LITIGATION	)
	)
This Document Relates To:	)
	)
All Actions	)
	)

JOINT STATUS REPORT
November 12, 2008

I. PENDING CASES

A. As of November 7, 2008, defendants have been served with approximately 206 Baycol cases that remain active, down from approximately 14,800 cases ever filed in this litigation. The active cases include approximately 31 cases filed in or removed to federal court, down from approximately 9,100 cases.

B. The federal cases involve 35 active plaintiffs. (The number of active plaintiffs excludes (a) plaintiffs for whom all parties have stipulated to dismiss or whose cases have settled but for whom a court order has not been entered, and (b) plaintiffs asserting only derivative claims.

II. SETTLEMENT

A. Defendants have settled 3,134 cases with a total value of $1,168,233,835. Of this total, 979 cases have been determined to be subject to the MDL assessment, with a total value of $365,232,920.

B. As of the last status conference (in December of last year), defendants had settled 3,110 cases with a total value of $1,162,700,835. Of this total, 968 cases had been determined to be subject to the MDL assessment, with a total value of $356,246,334.

C. Approximately 141 cases have been submitted to the MDL mediation process.

III. DISCOVERY

Plaintiffs were broken into four groups for case-specific discovery pursuant to PTO 149. The active plaintiffs remaining in those groups are distributed as follows:

Phase I:	0 plaintiffs
Phase II:	0 plaintiffs
Phase III:	3 plaintiffs
Phase IV:	26 plaintiffs
Late Actions:	5 plaintiffs (excluding Agenda Item VI)

The parties will submit to the Court an agreed order establishing discovery timetables for late-filed cases.

IV. TRIAL SETTINGS

A. The *Mary Reed* case was tried to a defense verdict in Mississippi In September of this year.

B. No other Baycol cases are set for trial.

V. MOTIONS

Attached is a table listing outstanding motions in this MDL.

VI. QUI TAM ACTION

VII. FUTURE OF THE MDL

Respectfully submitted,

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Richard A. Lockridge

Co-Lead Counsel for Plaintiffs

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Susan Weber
James Mizgala
Peter Sipkins

Counsel for Bayer

Fred Magaziner
Tracy Van Steenburg

Counsel for GSK

MDL-1431 Baycol Products Litigation
Pending Motions as of 11/10/2008

Other Motions

Case No.	Plaintiff at Issue	Filing Date	Motion Title	Notes
02-0199	Smith, Keith Sperlazza, Shirley (putative representatives in W. Va. Class action	10/31/ 2008	Motion for permanent injunction	Response due 11/17/ 2008 Reply due 11/24/ 2008
04-4350	Torres, Melinda	4/15/ 2008	"Third motion for substitution" (P)	Opposed 4/30/ 2008
08-0971	Stodghill, Mark	5/1/ 2008	Motion to remand (P)	Response Filed 5/20/ 2008

Summary Judgment Motions (and related items)

Case No.	Plaintiff at Issue	Filing Date	Motion Title	Notes
03-5336	Gardner, Walter	3/26/ 2008	Substitute motion for summary judgment (D)	Response due 4/16/ 2008
03-5337	Torquato, Constance, for Estate of Robert Torquato	1/30/ 2008	Motion for summary judgment (D)	Dismissal vacated and response set due 6/13/ 2008
		6/27/ 2008	Motion for extension to oppose SJ (P)	Response due 7/14/ 2008
04-0244	Turney, Thomas	2/22/ 2008	Motion for summary judgment (D)	Response deadline extended

Case No.	Plaintiff at Issue	Filing Date	Motion Title	Notes
04-1233	Falcon, Franklin Hurst, Jules Maiden, George Parmer, Pearl Smith, Jerlean Vay, Patricia Wright, Mary	3/18/ 2008	Motion for summ- ary judg- ment (D)	Resp- onse due 4/8/ 2008
04-1234	Davis, Paul Lynn	3/18/ 2008	Motion for summ- ary judg- ment (D)	Resp- onse due 4/8/ 2008
04-3272	Anderson, Sarah	3/18/ 2008	Motion for summ- ary judg- ment (D)	Respon- se due 4/8/ 2008
04-3667	Durston, Shirley Ann	2/20/ 2008	Motion for summ- ary judg- ment (D)	Fully briefed

Case No.	Plaintiff at Issue	Filing Date	Motion Title	Notes
04-4404	Reinhart, Charles, Jr.	3/10/ 2008	Motion for summ- ary judg- ment (D)	Resp- onse due 3/31/ 2008
04-4424	Valle, Michael	3/10/ 2008 4/23/ 2008	Motion for summ- ary judg- ment (D) Motion for leave to file in excess of limit (D)	Fully briefed
04-5088	Harvey, Betty	3/19/ 2008	Motion for summ- ary judg- ment (D)	Resp- onse due 6/9/ 2008
05-0203	Biagoli, Evo	3/18/ 2008	Motion for summ- ary judg- ment (D)	Respon- se due 4/8/ 2008
05-0205	McAtee, Debbie	3/18/ 2008	Motion for summ- ary judg- ment (D)	Respon- se due 4/8/ 2008

Case No.	Plaintiff at Issue	Filing Date	Motion Title	Notes
05-1339	Lagoon, Robert	3/28/ 2008	Motion for summ-ary judg-ment (D)	Fully briefed
05-1724	Thompson, Gwendolyn	6/5/ 2008	Motion for summ-ary judg-ment (D)	Fully briefed
05-1728	Adams, Norma Jean	2/25/ 2008	Motion for summ-ary judg-ment (D)	Resp-onse due 3/17/ 2008
05-2194	Jenks, Larry (La. Case)	3/5/ 2008	Motion for summ-ary judg-ment (D)	Fully briefed
05-2575	Held, Sharon	3/31/ 2008	Motion for summ-ary judg-ment (D)	Fully briefed

Case No.	Plaintiff at Issue	Filing Date	Motion Title	Notes
05-2578	Houston, Viola Thornhill, Mark	3/27/ 2008 3/31/ 2008	Motion for summ- ary judg- ment (D) Motion for summ- ary judg- ment (D)	Fully briefed Fully briefed
05-2688	Buseck, Edgar A.	2/29/ 2008	Motion for summ- ary judg- ment (D)	Fully briefed
06-1554	Wilson, Dolly	3/31/ 2008	Motion for summ- ary judg- ment (D)	Fully briefed

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PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 12 2010
OFFICE OF THE CLERK

No. 09-1205

In the Supreme Court of the United States

KEITH SMITH and SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

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November 12, 2010

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QUESTIONS PRESENTED

1. The relitigation exception to the Anti-Injunction Act permits a federal court to enjoin a state-court proceeding on the basis of issue preclusion only when all of its elements are established, including that the state parties against whom the injunction is sought were parties to or in privity with parties to the prior federal litigation and that issues necessary to the resolution of the proceedings are identical. In determining whether issues are identical, courts have also recognized that state courts should have discretion to apply their own procedural rules in a manner different from their federal counterparts. Can the district court's injunction be affirmed when the parties against whom preclusion is invoked were not parties to the prior action or in privity with parties to that action, and the issues presented are not identical?

2. The rule against nonparty preclusion is a fundamental tenet of American jurisprudence. One exception to the rule against nonparty preclusion is that absent members of a class in a properly conducted class action may be subject to preclusion because of the due-process protections afforded absent members once class certification has been granted. When a federal district court denies certification of a statewide class, does it have personal jurisdiction over absent members of the once-proposed class–who, because of the denial, were never afforded all of the due-process protections required had certification been granted–for purposes of enjoining them from seeking certification of a similar class in state court?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit affirming the issuance of a permanent injunction against petitioners is reported at 593 F.3d 716 and is reproduced in the appendix to the petition for writ of certiorari at 1a-19a. The order of the United States District Court for the District of Minnesota granting the permanent injunction has not been officially reported but is available at 2008 WL 7425712 and is reproduced in the appendix to the petition for certiorari at 20a-34a. The prior order of the district court denying certification of a West Virginia class action and granting summary judgment against George McCollins is reported at 265 F.R.D. 453 and is reproduced in the appendix to the petition for certiorari at 35a-52a.

JURISDICTION

Respondent Bayer Corporation filed an expedited motion for a permanent injunction on October 31, 2008, in the United States District Court for the District of Minnesota. Petitioners appeared specially before the district court to contest its personal jurisdiction and the applicability of the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. On December 9, 2008, the district court issued its order granting the permanent injunction. Pet. App. 20a-34a.

On January 6, 2009, petitioners timely appealed the order to the Eighth Circuit, which had jurisdiction to hear the appeal of the permanent injunction. *See* 28 U.S.C. §§ 1291 & 1292(a)(1). The

Eighth Circuit issued its decision on January 5, 2010, affirming the district court. Pet. App. 1a-19a.

The petition for writ of certiorari was timely filed on April 5, 2010, and was granted by the Court on September 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend V.

The Anti Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

The All-Writs Act provides, in relevant part, that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Pertinent portions of Federal Rule of Civil Procedure 23 and West Virginia Rule of Civil Procedure 23 are set forth in the appendix to this brief.

STATEMENT OF THE CASE

The underlying cases involve the prescription drug, Cerivistatin, marketed in the United States under the brand name Baycol. Baycol is one of a

class of drugs known as statins. Statins are prescribed to individuals suffering from high cholesterol to lower their lipid levels with the goal of decreasing their risk of cardiac diseases. While other statins have been available on the market since the late 1980's, Baycol was not approved by the FDA until June 1997. It was initially approved in dosages of .02 and .03 mgs, and these dosages were made available on the market in early 1998. Over the next two years, Bayer, as the manufacturer of Baycol, sought and obtained approval from the FDA for the higher dosages of .04 and .08 mgs respectively. *See In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201 (D.Minn. 2003); *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1035 (D.Minn. 2007).

After thirty-one deaths in the United States were linked to Baycol, it was withdrawn from the United States market in August 2001. Adverse event reports suggested a link between Baycol and diseases such as rhabdomyolysis, myalgia, myositis, and myopathy. More than 100 deaths worldwide have been linked to Baycol. Additionally, conservative estimates indicate that adverse event reports and clinical studies revealed injuries in at least another 1,000 cases. *See In re Baycol Prods. Litig.*, 218 F.R.D. at 201-02.

Following Baycol's withdrawal from the market, thousands of lawsuits were filed in state and federal courts alleging product-liability claims as well as other related statutory and common-law claims. Common among the allegations in these lawsuits were factual assertions that Bayer did not adequately test, develop, and study Baycol or disclose all relevant information to the FDA, the medical

community, and the public; and, furthermore, that the warnings actually issued, as well as the advertising and promotional material, were false, misleading, and otherwise inadequate particularly as to the risks and dangers associated with using Baycol in higher dosages and/or in combination with another class of lipid-lowering drugs known as fibrates, especially a drug named gemfibrozil. *See id.*

On September 20, 2001, petitioners, Keith Smith and Shirley Sperlazza,[1] (collectively "Smith") filed a civil action in the Circuit Court of Brooke County, West Virginia, seeking certification of a West Virginia-only class action and asserting state-law product liability and related claims regarding the manufacture, sale, advertisement, warnings, and use of Baycol. *Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (1-3) JPM (Cir.Ct. Brooke County, W.Va. Sept. 20, 2001). As set forth in the complaint, Smith sought certification of a class of "all West Virginia residents and others who have ingested Cerivastatin, sold under the trade name 'Baycol' in West Virginia" and requested damages for personal injury, medical monitoring, and economic loss. JA 152-76.

On September 30, 2008, pursuant to the last scheduling order that had been entered in the case, Smith filed a motion seeking certification of an eco-

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[1] Nancy Gandee was also initially a named plaintiff, but she settled her claims in July 2003 and is no longer a proposed representative or member of the putative class in *Smith*. The plaintiffs also originally sued two, non-diverse West Virginia citizens who later were dismissed.

nomic-loss-only class under Rule 23(b)(3) of the West Virginia Rules of Civil Procedure based on state-law claims of fraud, breach of warranties, and violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W.Va.Code § 46A-6-101, *et seq.* JA 177-213. That scheduling order, which had been entered on March 18, 2008, set a class-certification hearing for December 10, 2008.

On October 31, 2008, Bayer filed an expedited motion for a permanent injunction seeking to enjoin the class-certification hearing because the United States District Court for the District of Minnesota[2] had, on August 25, 2008, denied certification of a similar proposed West Virginia economic-loss-only class, under Rule 23(b)(3) of the Federal Rules of Civil Procedure, in the case of *In re Baycol Prods. Litig., McCollins v. Bayer Corp.*, 265 F.R.D. 453 (D.Minn. 2008); Pet. App. 35a-52a. JA 90-93.

Smith–who was not a named plaintiff in *McCollins* and had received no notice of *McCollins* or the motion and order regarding class certification therein–opposed Bayer's motion. Smith appeared specially to contest personal jurisdiction and the propriety of an injunction under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651(a). *See* JA 308-27.

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[2] The district court had been designated by the Judicial Panel for Multidistrict Litigation as the transferee court ("MDL court"), under 28 U.S.C. § 1407, for Baycol cases filed or removed to district courts. *In re Baycol Prods. Liab. Litig.*, 180 F. Supp. 2d 1378 (J.P.M.L Dec. 18, 2001).

Contrary to Bayer's suggestions, Smith had not delayed seeking his own class certification in West Virginia in order to ascertain whether class certification would be granted in *McCollins* or whether respondent would change its stance on settling economic-loss only claims. During the relevant time frame, neither Smith nor his counsel had any knowledge that *McCollins* or any other Baycol case seeking certification of a West Virginia class action was pending before the district court.[3] As to the delay in having the class-certification request decided, at least four different scheduling orders had been entered that set deadlines for class discovery, the filing of memoranda supporting and opposing class certification, and a class-certification hearing. The first three of those scheduling orders had been continued on joint motions to amend the various deadlines because of the need for more discovery and/or other scheduling conflicts.[4]

By order entered on December 9, 2008, the district court granted Bayer's motion for a permanent injunction. *In re Baycol Prods. Litig., Smith v.*

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[3] Counsel for Smith were aware that an MDL Court had been established to handle Baycol litigation pending in federal court because they had one or more individual actions removed to federal court and transferred to the MDL. But none of those cases involved requests for class-action certification, and counsel for Smith were not served with papers in the *McCollins* case.

[4] Class-certification hearings had been set for April 4, 2007, August 29, 2007, August 27, 2008, and December 10, 2008, by scheduling orders entered respectively on or about May 10, 2006, March 8, 2007, September 27, 2007, and March 18, 2008.

Bayer Corp., 2008 WL 7425712 (D.Minn. Dec. 9, 2008) (Davis, C.J.). Pet. App. 20a-34a. On January 6, 2009, Smith timely appealed the ruling to the Eighth Circuit. On January 5, 2010, the Eighth Circuit issued its opinion affirming the district court's grant of the injunction. *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010). Pet. App. 1a-18a.

SUMMARY OF ARGUMENT

I. The Anti-Injunction Act, 28 U.S.C. § 2283, is premised upon principles of federalism and comity and prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." This Court has consistently cautioned that proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court. The exceptions to the Act's prohibition of injunctions were designed to ensure the effectiveness and supremacy of federal law and are to be narrowly construed. Any doubt about whether an injunction should be issued must be resolved against issuing the injunction. Before issuing an injunction the federal court must independently possess both subject-matter jurisdiction and personal jurisdiction because neither the All Writs Act, 28 U.S.C. § 1651(a), nor the Anti-Injunction Act create such jurisdictional prerequisites.

In this case, Bayer has advanced, and the courts below relied on, only the third of the Act's excep-

tions, commonly known as the relitigation exception. The relitigation exception is based upon principles of res judicata and collateral estoppel and may be invoked to bar the relitigation of claims and issues actually decided by a federal court in a prior proceeding. Collateral estoppel is the particular preclusion doctrine that has been advanced in this case by Bayer and the courts below.

Even though the preclusion doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) generally are used to bind parties to a prior final judgment on the merits, Smith in this case is in effect being bound by a procedural ruling of the district court denying certification of a similar, proposed class action brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Because Smith was not the same party who brought the prior proceeding and was not in privity with him, Smith is not bound by the judgment in that action, and the district court did not have the authority to enjoin him under the relitigation exception.

Collateral estoppel also does not apply because the same issues were not litigated in the prior proceeding, let alone essential to the judgment eventually reached. Federal courts have recognized that state courts must be given the right and discretion to interpret and apply their own procedural rules in a manner different from their federal counterparts, even if the state rules of procedure are modeled after the federal rules of procedure. Accordingly, the district court's decision denying class certification under Federal Rule of Civil Procedure 23(b)(3) cannot be used to collaterally estop a West

Virginia state court from deciding whether the same or similar class may be certified under West Virginia Rule of Civil Procedure 23(b)(3).

II. The limits on preclusion in this case have powerful constitutional underpinnings. There is a deep-rooted historic tradition in this country that everyone is entitled to have his own day in court. It is an often-repeated rule that one is not personally bound by a judgment in a litigation in which he has not been voluntarily designated as a party or been made a party by service of process. Accordingly, while a judgment binds the parties to a lawsuit as to the claims and defenses that were asserted in the lawsuit, as well as to the resolution of all of the issues that were actually litigated and essential to the judgment, it does not conclude the rights of strangers to those proceedings.

The general rule against nonparty preclusion is grounded in the United States Constitution, that limits the circumstances under which judgments have binding effect to those in which due process has been afforded. Notice and an opportunity to be heard are fundamental requirements of due process. Indeed, a right to be heard has little value unless one receives notice reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to appear.

Limited exceptions to the general rule against nonparty preclusion have been adopted in appropriate circumstances. One of the exceptions is that a properly conducted class action may bind absent class members because of the due-process protections that are afforded absent members upon certification of a class. As to class actions governed by

Rule 23(b)(3) of the Federal Rules of Civil Procedure, the due-process protections afforded absent members include reasonable notice, the opportunity to be heard, the opportunity to be excluded or to opt out, and the requirement that named class representatives and class counsel adequately represent the interests of the absent members.

Here, Smith was not a named party to the prior federal proceeding and, due to the denial of class certification, he never received any of the due-process protections afforded absent members in a (b)(3) class action. Decisions of this Court, discussing the due-process protections incorporated in Rule 23, establish that the class-action exception to the rule against nonparty preclusion only applies to properly conducted class actions, not to cases in which class treatment is denied. Because the class-action exception does not apply and no other exceptions have or could have been raised in this case, the decision below violates both due process and preclusion principles.

The Eighth Circuit asserted that protections purportedly afforded Smith by the prior judgment, i.e., adequate representation, the supposed right to appeal the decision denying class certification, and the right to bring an individual action, satisfy due process. Adequate representation is only one of the due-process protections required for Rule 23(b)(3) classes. The suggestion that Smith had a right to appeal the denial of class certification is purely imaginary because he never received notice of the action or the certification ruling. Similarly, the right to bring an individual action is meaningless because of the small amount of economic damages at

issue per person. One of the primary purposes of class actions is to enable litigants who have small damages claims to seek justice through an aggregation device that permits them to combine their individual claims with those of others who have been similarly damaged by the same defendant(s). Denying Smith his right to seek class certification effectively deprives him of the opportunity to assert his state-law claims for relief–claims that are in and of themselves protected-property interests entitled to due-process protections.

ARGUMENT

I. An Injunction Cannot Properly Be Issued on the Basis of Collateral Estoppel Under the Relitigation Exception to the Anti-Injunction Act When Neither the Parties Nor the Issues Are Identical.

A. The Anti-Injunction Act Is Based on Principles of Federalism and Comity and Its Exceptions Must Be Construed Narrowly Against Enjoining State-Court Proceedings.

The doctrines of federalism and comity are well entrenched in our jurisprudence. From the inception of our country, our founding forefathers wisely declined to have the new federal government usurp the entirety of the new nation's governmental functions, recognizing that a vital consideration of comity is a proper respect for state functions and the separate and independent nature of state governments. *See Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

The Anti-Injunction Act, adopted in 1793, is premised on these principles of federalism and comity, recognizing that "from the beginning we have had in this country two essentially separate legal systems . . . . proceed[ing] independently of the other with ultimate review in this Court of the federal questions raised in either system." *Atlantic Coast Line R. Co. v. Brotherhood of Loc Eng.*, 398 U.S. 281, 286 (1970). Because "[u]nderstandably this dual system was bound to lead to conflicts and frictions[,]" the Anti-Injunction Act was adopted, at least in part, "in order to make the dual system work and 'to prevent needless friction between state and federal courts.'" *Atlantic Coast*, 398 U.S. at 286 (quoting *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940)). As more recently explained by this Court:

> The Act . . . is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. Prevention of frequent federal court intervention is important to make the dual system work effectively. By generally barring such intervention, the Act forestalls "the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court." . . . Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings "should normally be allowed to

> continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion); *Atlantic Coast*, 398 U.S. at 287) (internal citations omitted). *Accord Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. at 9; *Kline v. Burke Construction Co.*, 260 U.S. 226, 229-30 (1922).

In recognition of principles of federalism and comity, this Court has acknowledged that parallel actions in federal and state courts seeking to enforce a personal liability are not improper.

> Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. . . .

Kline, 260 U.S. at 230-31 (citations omitted) (distinguishing *in rem* and *in personam* proceedings). Accordingly, the mere existence of a parallel lawsuit in state court that seeks to litigate the same *in personam* action is not in itself sufficient grounds

for the federal court to stay the state proceedings. *Vendo Co.*, 433 U.S. at 642. "[I]nefficient simultaneous litigation in state and federal courts on the same issue" is "one of the costs of our dual court system." *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524-25 (1986).

The present version of the Anti-Injunction Act absolutely prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1970). *E.g.*, *Atlantic Coast*, 398 U.S. at 286-87; *Chick Kam Choo*, 486 U.S. at 145-46; *Vendo Co.*, 433 U.S. at 630. Because the prohibition against injunctions "in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." *Atlantic Coast*, 398 U.S. at 287. *Accord Chick Kam Choo*, 486 U.S. at 146.

Rather, the exceptions to the Act's prohibition of injunctions were "designed to ensure the effectiveness and supremacy of federal law" and are to be narrowly construed against enjoining state-court proceedings. *Chick Kam Choo*, 486 U.S. at 146. Accordingly, as this Court has cautioned, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast*, 398 U.S. at 297. *Accord Vendo Co.*, 433 U.S. at 630-31.

In this case, Bayer has advanced, and the courts below have relied on, only the third of the Act's ex-

ceptions, commonly known as "the relitigation exception." The relitigation exception is based upon principles of res judicata and collateral estoppel. *Chick Kam Choo*, 486 U.S. at 147. But the relitigation exception is narrower than the broadest principles of res judicata because it only applies to claims and issues that have been actually decided by the federal court in the prior proceeding. *Id.* 486 U.S. at 148 (citing *Atlantic Coast*, 398 U.S. at 290); *Weyerhaeuser Co. v. Wyatt*, 505 F.3d 1104, 1109-11 (10th Cir. 2007).

When an exception to the Anti-Injunction Act applies, the All Writs Act, 28 U.S.C. § 1651(a), provides the positive authority for a federal court to issue an injunction against state-court proceedings. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998). Both the All Writs Act and the relitigation exception to the Anti-Injunction Act are permissive and non-mandatory in nature. *Bailey v. State Farm Fire and Casualty Co.*, 414 F.3d 1187, 1189 (10th Cir. 2005). Before issuing an injunction the federal court must already independently possess both subject-matter jurisdiction and personal jurisdiction because neither the All Writs Act nor the Anti-Injunction Act creates such jurisdictional prerequisites. *See, e.g., Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31-34 (2002); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 198 (3d Cir. 1993).

When addressing the relitigation exception, a federal court applies federal common law in determining the preclusive effect of a federal-court judgment. Under federal common law, a federal

court will "usually incorporate the collateral estoppel doctrine of the relevant state unless it is 'incompatible with federal interests[,]' in which case 'a contrary federal rule' may be justified." Pet. App. 6a-7a (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001)).

Under West Virginia law, collateral estoppel requires: (1) the issue previously decided must be identical to the one presently in question; (2) there must have been a final adjudication on the merits in the prior action; (3) the party against whom the doctrine is invoked must have been a party or in privity with a party to the prior action; and (4) the party against whom the doctrine is invoked must have had a full and fair opportunity to litigate the issue in the prior action. *Peters v. Rivers Edge Min., Inc.*, 680 S.E.2d 791, 809 (W.Va. 2009); *State v. Miller*, 459 S.E.2d 114, 120 (W.Va. 1995) (footnote and citations omitted); *Conley v. Spillers*, 301 S.E.2d 216, 220-21 (W.Va. 1983). "[C]ollateral estoppel requires identical issues raised in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment." *State v. Miller*, 459 S.E.2d at 120; *Peters*, 680 S.E.2d at 808. *Accord* Restatement (Second) of Judgments § 27 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). Accordingly, for all purposes relevant to this action, the doctrine of collateral estoppel as applied in West Virginia is consistent with

the doctrine as applied under federal common law. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Montana v. U.S.*, 440 U.S. 147, 153 (1979) (and cases cited therein).

Notably, in the relevant state-court proceeding, there is no issue of federal law, the effectiveness or supremacy of which must be protected by an injunction. Smith has not pleaded any claim based on federal common or statutory law. Any class-certification hearing held by the West Virginia Circuit Court would involve only issues of West Virginia's substantive law and its procedural law set forth in Rule 23 of the West Virginia Rules of Civil Procedure. Decisions of federal courts applying state substantive law are not binding precedential authority on any state court. *E.g.*, *Johnson v. Fankell*, 520 U.S. 911, 916-17 (1997); *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 913 n. 18 (W.Va. 2007); *Caperton v. A.T. Massey Coal Co., Inc.*, 690 S.E.2d 322, 356 (W.Va. 2009). And decisions of a federal court interpreting and applying the Federal Rules of Civil Procedure are not binding on a state court interpreting and applying its own Rules of Civil Procedure, even if they are modeled on the Federal Rules. *E.g.*, *Fankell*, 520 U.S. at 916; *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen v. Stewart Title Guaranty Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 (E.D.Pa. March 20, 2007); *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52, 61 (W.Va. 2003).

Accordingly, the reasons for which the exceptions to the Anti-Injunction Act's prohibition of in-

junctions were designed, i.e., to ensure the effectiveness and supremacy of federal law, are not present here. *See Chick Kam Choo*, 486 U.S. at 146.

B. Collateral Estoppel Cannot Properly Be Applied Under the Relitigation Exception to the Anti-Injunction Act in this Case Because Smith Was Not a Party or in Privity with Parties in the *McCollins* Action.

Smith was not a named party in the *McCollins* litigation. Cases estopping named parties from relitigating the denial of class certification are therefore inapplicable here.[5] Moreover, for reasons to be fully explained in part II of this brief, due process considerations do not permit Smith to be deemed a party under the class-action exception to the rule against nonparty preclusion. Accordingly, *In re BridgeStone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763, 768-69 (7th Cir. 2003), the principal basis for the Eighth Circuit's decision, cannot justify binding Smith to the result in *McCollins*.

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[5] *See Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1012 & 1015 (8th Cir. 2002) (court noting "ten of the original plaintiffs from *Canady I* filed two new class actions in Missouri state court"); *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 216 & 218-19 (8th Cir. 1977) (upon denial of request for class certification in a Florida state court, the same plaintiff then filed six other proposed class actions in federal district courts); *In re Dalkon Shield Punitive Damages Litig.*, 613 F. Supp. 1112, 1116 (E.D.Va. 1985) (same defendant seeking certification of a class on issue of punitive damages).

C. Collateral Estoppel Cannot Properly Be Applied Under the Relitigation Exception to the Anti-Injunction Act in this Case Because the Issues Presented Are Not Identical to the Issues Decided in the *McCollins* Action.

As to the issues presented, not only has Smith asserted a common-law claim of fraud that was not alleged in *McCollins*, but, more importantly, the West Virginia Circuit Court would be determining class-certification issues under Rule 23 of the West Virginia Rules of Civil Procedure rather than under Rule 23 of the Federal Rules of Civil Procedure which the district court in *McCollins* applied. State courts may exercise their discretion under their own rules of procedure addressing certification of class actions differently than their federal counterparts.[6] *E.g.*, *J.R. Clearwater Inc.*, 93 F.3d at 180; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen*, 2007 WL 916859, at **1-2.

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[6] The Eighth Circuit's decision in *Canady v. Allstate Ins. Co.*, *supra*, does not detract from this point. In *Canady*, the civil action sought to be enjoined had been removed to federal court and, because it was mistakenly believed that subject-matter jurisdiction existed for the removal under the All Writs Act, 28 U.S.C. § 1651(a), the premise of the Eighth Circuit's decision was that the federal rules would apply in the action to be enjoined. *Canady*, 282 F.3d at 1016-17 & 1019. The Eighth Circuit's view that subject-matter jurisdiction existed for the removal under the All Writs Act was incorrect. *See Syngenta Crop Protection*, 537 U.S. at 31-34; *Arkansas Blue Cross and Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821-22 (8th Cir. 2009).

As explained by the Fifth Circuit in *J.R. Clearwater*:

> The denial of class certification is "a procedural ruling, collateral to the merits of a litigation. . . . ," *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336 (1980), and the decision as to whether to certify a class lies within the "wide discretion" of the trial court. . . . . While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, . . . *a Texas court might well exercise this discretion in a different manner*. It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that *each court-or at least each jurisdiction-be free to make its own determination in this regard. . . . This reasoning is particularly applicable when matters of state-federal relations are involved* as in the present case in which an injunction would impinge upon the state court's ability to exercise discretion in the administration of its own docket *contrary to the policies underlying the Anti-Injunction Act*.

93 F.3d at 180 (emphases added; internal citations omitted).

Similarly, the Third Circuit has held that its interpretation of Rule 23 of the Federal Rules of Civil Procedure is not binding on a state court applying its own class-certification rules. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146 ("[O]ur construction of Rule 23

and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23. Rather, the Louisiana court properly applied . . . the parallel Louisiana class certification rule." (footnote and citation omitted)).

This point has also been recognized by the American Law Institute ("ALI") in its *Principles of the Law of Aggregate Litigation* § 2.11 (2010). The ALI suggests that principles of comity, rather than preclusion, should affect a forum court's discretion as to whether to follow a prior court's denial of class certification when dealing with the same or similar class-certification question.[7] As explained by the ALI in its comments:

> Apart from the further due-process limitations, issue preclusion itself requires that the same issue must have been litigated and determined in the proceeding that produced the adjudication now said to have preclusive effect. The same-issue requirement is relatively strict, calling for litigation and determination

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[7] While petitioners do not agree with the ALI's suggestion that comity considerations support a rebuttable presumption that a state court should follow a federal court's denial of certification, the acknowledgment that comity rather than preclusion should guide a forum court's discretion is more consistent with this Court's pronouncements that under the Anti-Injunction Act "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." *Atlantic Coast Line R. Co.*, 398 U.S. at 286-87 (1970). *Accord Chick Kam Choo*, 486 U.S. at 146-50; *Kline*, 260 U.S. at 229-30.

> in the initial proceeding not simply of the same kind of issue concerning the appropriateness of aggregation but, rather, the identical issue. Same-issue status is not present when the aggregation question in the first proceeding arose under a procedural rule of the rendering court and the aggregation question in the subsequent proceeding arises under a procedural rule—albeit, perhaps, an identically phrased rule—that need not be interpreted or applied in identical fashion. Issue preclusion is generally not appropriate in such a situation, for the court in the subsequent proceeding must have the opportunity, if it chooses, to construe its procedural rule differently on the aggregation question, within the ambit afforded by federal constitutional due process.
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> . . .

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further stated in the Reporters' Note to Comment b:

> Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone/Firestone* represented the minority view within the federal circuits, with other courts emphasizing the stringency of the same-issue requirement for issue preclusion. *See J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *accord In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (citing with approval *Clearwater*). . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010).

This Court's opinion in *Chick Kam Choo* strongly supports the principle that a state court should be permitted to apply its own procedural rules governing access to its courts and that the relitigation exception to the Anti-Injunction Act cannot be used to enjoin such state-court proceedings solely on the basis that a federal court had previously applied its own procedural rules to the issue in question. There, this Court rejected the issuance of an injunction under the relitigation exception, reasoning that a Texas state court's application of Texas' *forum non conveniens* principles could not be foreclosed by a federal court's prior decision dismissing the same claims under federal *forum non conveniens* principles:

> [T]he only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine. *Federal forum non conveniens principles simply cannot determine whether Texas courts, which operate under a broad "open-courts" mandate, would consider themselves an appropriate forum for petitioner's lawsuit.* . . . Moreover, the Court of Appeals expressly recognized that the Texas courts would apply a significantly different *forum non conveniens* analysis. . . . *Thus, whether the Texas state courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception.*

Chick Kam Choo, 486 U.S. at 148-49 (emphases added).[8]

Recognition that a denial of a class certification is a procedural ruling and that federal and state courts have authority to interpret and apply their own procedural rules independently of one another demonstrates the conundrum posed by the decision below. Indeed, the preclusion doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) typically only apply to substantive rulings in prior actions that have reached final judgment. Although the denial of class certification became subject to appeal when final judgment was issued against George McCollins on his substantive claims for relief (in the same order in which the district court had denied class certification), the only truly substantive ruling essential to the final judgment was that granting summary judgment against Mr. McCollins.

The Eighth Circuit attempted to sidestep the procedural nature of a ruling denying class certification by finding (1) that Smith has not pointed to any significant substantive or procedural differences between the federal and state versions of Rule 23, and (2) that a determination of whether to certify a class under Rule 23 is as much a substantive ruling as a procedural one. Pet. App. 7a-11a. *See also Bridgstone/Firestone*, 333 F.3d at 768 ("De-

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[8] *See also Baker v. General Motors Corp.*, 522 U.S. 222, 232-33)("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" (citation omitted)).

termining the permissible scope of litigation is as much substantive as it is procedural."). But these holdings, like the proverbial "house built upon sand," lack a strong foundation.[9]

First, the cases cited above by Smith do not base their holdings upon actual substantive or procedural distinctions in the language of the respective rules of civil procedure, but upon the power of a state court to construe and apply its rules in a different manner with a different result.[10] That the West Virginia Supreme Court of Appeals applies its version of Rule 23 in a manner different from its federal counterparts is readily demonstrated by contrasting the decisions in the Rezulin MDL proceedings, *In re Rezulin Products Liability Litigation*, 210 F.R.D. 61 (S.D.N.Y. 2002), as well as the District Court's own decision in *McCollins*, Pet. App. 35a-52a, both applying Fed.R.Civ.P. 23 to deny class certification of an economic-loss claim based on breach of express and implied warranties and violation of the WVCCPA involving pharmaceutical products, with the West Virginia Supreme Court of Appeals' decision in *In re West Virginia Rezulin Litigation*, *supra*, reversing a trial court's denial of such a class certification.[11]

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[9] *Matthew* 7:24-27.

[10] *See J.R. Clearwater*, 93 F.3d at 180; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen*, 2007 WL 916859, at **1-2.

[11] The Eighth Circuit's attempt to refute this argument by contending that the district court's decision in *McCollins* (i.e., that common issues did not predominate on questions of causation) was based on different grounds than the West Virgima

(Footnote continued)

Indeed, in *In re West Virignia Rezulin Litigation*, the West Virginia Supreme Court of Appeals emphasized:

> The circuit court, in its order denying class certification, appears to have relied almost exclusively on federal cases interpreting Rule 23 of the Federal Rules of Civil Procedure–and denying class certification–in drug or medical device actions. As we made clear . . . "[a] federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling." Our reasoning for this rule is to avoid having our legal analysis of our *Rules* "amount to nothing more than Pavlovian responses to federal decisional law."

In re West Virginia Rezulin Litigation, 585 S.E.2d at 61 (citations omitted).

Second, the district court's conclusion that proof of individual causation of damages is required to ultimately establish proximate cause is not determinative of whether a class action may be permitted under Rule 23 of the West Virginia Rules of

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Supreme Court of Appeals' decision in *In re West Virignia Rezulin Litigation* (i.e., that common issues did predominate on questions of damages) is largely a distinction without significance. *See* Pet. App. 10a n. 4; Pet. App. 25a. The defendants argued in *In re West Virignia Rezulin Litigation*, and the trial court held, that individual issues predominated over common issues on all questions of liability, causation, and damages. *See In re West Virginia Rezulin Litigation*, No.Civ.A. 00-C-1180-H, 2001 WL 1818442 (W.Va.Cir.Ct., Raleigh County, December 13, 2001) (Hutchison, J.).

Civil Procedure. A class action may be permitted under Rule 23(b)(3) of the West Virginia Rules of Civil Procedure if the court concludes that common issues predominate over individual issues enough to make a class action superior, even if individual issues of damages would have to be later decided separately. *See In re West Virginia Rezulin Litigation*, 585 S.E.2d at 72-76.

Third, that a court must be aware of the elements of substantive state-law claims to determine the typicality, common question, and predominance prongs of a Rule 23 analysis does not transform the analysis from a procedural ruling to a substantive one. This Court has consistently held that a party's "right to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). *See also United States Parole Commission v. Geraghty*, 445 U.S. 388, 402 (1980) (a plaintiff seeking class certification presents two separate issues for judicial resolution, the claim on the merits and the procedural claim that he is entitled to represent a class); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure `shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)."); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (same). Accordingly, this Court "view[s] the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after

the entry of final judgment." *Roper*, 445 U.S. at 336.

The Court has also expressly held that a court in conducting a Rule 23 analysis should not make rulings on the merits of substantive claims: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). A Rule 23 determination is a "rigorous analysis", *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), that "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). But the complex nature of the analysis and its consequential effect on substantive rights do not alter the procedural nature of the Rule 23 determination. *See Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010). Nor does the complex nature of the analysis permit a court to resolve on the merits the substantive claims of a plaintiff.[12] Adopting the approach advanced by

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[12] *See* Fed.R.Civ.P. 23 advisory committee's note to 2003 amendments ("Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense, it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis."); *Unger v. Amedisys Inc.*,

(*Footnote continued*)

respondent and the courts below would emasculate these principles because a trial court must always be aware of the substantive law and issues in examining class-certification requirements under Rule 23(a) & (b).

II. Both Due Process and Preclusion Principles Are Violated by Binding Absent Class Members to a Decision Denying Class Certification Because They Have Never Received Any Notice or an Opportunity to be Heard or to Opt Out.

Relying, in part, upon the Seventh Circuit's decision in *In re BridgeStone/Firestone, Inc. Tires Prod. Liab. Litig.*, *supra*, the Eighth Circuit held that the district court had personal jurisdiction

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401 F.3d 316, 321 (5th Cir. 2005) ("Class certification hearings should not be mini-trials on the merits of the class or individual claims. ... At the same time, however, '[g]oing beyond the pleadings is necessary, as the court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" (internal citations omitted)); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("The analysis of Rule 23 must focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental. The findings made for resolving a class action certification motion serve the court *only* in its determination of whether the requirements of Rule 23 have been demonstrated. . . . The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any facts differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment.").

over Smith so as to collaterally estop him under the relitigation exception to the Anti-Injunction Act from seeking class certification in a West Virginia state court on the basis of the class-action exception to the rule against nonparty preclusion.

The Eighth Circuit's decision violates both due process and preclusion principles and is inconsistent with precedent of this Court. As the majority rule in the courts of appeals properly recognizes, a federal court's denial of class certification does not, and cannot, preclude absent members of the putative class from pursuing certification in a state court.

A. Notice and an Opportunity to Be Heard Are Essential Prerequisites to Binding a Litigant to a Judgment in a Prior Case.

This Court has "often repeated the general rule that 'one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor*, 553 U.S. at 893 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. at 846; *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *Martin v. Wilks*, 490 U.S. 755, 761 (1989). "The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 553 U.S. at 892-93 (quoting *Richards*, 517 U.S. at 798 (internal quotation marks omitted)). *Accord Martin*, 490 U.S. at 761-62. "As a consequence, '[a] judgment or decree

among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.'" *Richards*, 517 U.S. at 798 (quoting *Martin*, 490 U.S. at 762; *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971)).

This general rule against nonparty preclusion is grounded in the due-process protections of the United States Constitution because a judgment against one not properly made a party "is not entitled to the full faith and credit which the Constitution . . . prescribe[s] . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires. . . ." *Hansberry v. Lee*, 311 U.S. at 40-41 (internal citations omitted). As this Court stated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985), "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party."

Nonparties to a prior action "may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue Laboratories, Inc.*, 402 U.S. at 329 (citing *Hansberry*, 311 U.S. at 40). *Accord Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n. 7 (1979).

Accordingly, "extreme applications of the doctrine of res judicata may be inconsistent with a fed-

eral right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797 (quoting *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475 (1918). When a judgment purportedly entitled to the binding force and effect of res judicata

> is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded *such notice and opportunity to be heard as are the requisite to the due process which the Constitution proscribes.*

Hansberry, 311 U.S. at 40 (emphasis added; citation omitted).

And as the Court reiterated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950):

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 [(1914)]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
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> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .

Mullane, 339 U.S. at 314 (citations omitted). *Accord Schroeder v. City of New York*, 371 U.S. 208, 211-12 (1962).

This Court was given an opportunity to address the question of whether a lack of notice could be cured by a finding of adequate representation in *Richards v. Jefferson County, supra.* In *Richards*, a group of Alabama taxpayers sought to challenge through a class action the constitutionality of a county's occupation tax. The Alabama Supreme Court found that the proposed class action was barred by the doctrine of res judicata because the plaintiffs had been adequately represented in a prior consolidated adjudication that had unsuccessfully challenged the constitutionality of the tax and that had been brought by three different county taxpayers, the City of Birmingham, and the City's acting finance director. The Alabama Supreme Court held the nonparties bound even though the prior adjudication was not a class action and absolutely no notice had been provided to any nonparties. *Id.* 517 U.S. at 795-96.

This Court was particularly troubled by the lack of any notice since "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Id.* at 799 (quoting *Mullane*, 339 U.S. at 314) (other citations omitted). The Court also acknowledged:

> Of course, mere notice may not suffice to preserve one's right to be heard in a case such as the one before us. The general rule is that "[t]he law does not impose upon any person

> absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger."

Id. at 800 n. 5 (quoting *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 441 (1934)). *Accord Martin v. Wilks*, 490 U.S. at 763-64 (same; also holding that the Federal Rules of Civil Procedure incorporate the same principle). Indeed, the Court subsequently held that knowledge or awareness of prior litigation by a nonparty, even when represented by the same lawyer who brought the prior action, is not sufficient to trigger res judicata. *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). *See also Taylor v. Sturgell*, 553 U.S. at 889-90 & 897-98.

But instead of basing its decision in *Richards* on the lack of notice, this Court proceeded to hold that based upon the facts of the case a finding of adequate representation could not be made, consistent with the dictates of due process, to justify the application of the doctrine of res judicata. The Court explained that for a finding of adequate representation to meet the dictates of due process the prior adjudication "would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.'" *Id.* at 801 (quoting *Hansberry*, 311 U.S. at 43). In *Richards*, such a finding could not be supported because the plaintiffs in the prior adjudication had neither sued on behalf of a class, asserted any claims in their pleadings on behalf of any nonparties, nor obtained

a judgment that purported to bind any nonparties. *Id.* at 801-02.

B. At Least in Rule 23(b)(3) Classes, All of the Due-Process Protections Incorporated into Rule 23 Must Be Provided to Absent Class Members in Order to Bind Them to a Judgment.

Because this Court in *Hansberry*, after its initial discussion of due-process requirements including notice and an opportunity to be heard, acknowledged that a "class" or "representative" suit was a recognized exception to the rule against nonparty preclusion and, in discussing that exception, focused on the importance of adequate representation without further mentioning the necessity of the notice component, *see Hansberry*, 311 U.S. at 41-46, some litigants began arguing that notice might not be an essential requirement in at least some class actions provided the absent members were adequately represented. *See Richards*, 517 U.S. at 801. But the reasonableness of any contention that notice might not be necessary, provided adequate representation exists, has been laid to rest (at least as to Rule 23(b)(3) classes) by subsequent decisions[13] of this Court and the substantial amend-

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[13] The *Hansberry* Court noted that this exception was "to an extent not [then] precisely defined by judicial opinion." *Hansberry*, 311 U.S. at 41. The Court also declared that the provided procedure would at least have to be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. . . . We decide only that the procedure and the course of litigation

(*Footnote continued*)

ments, beginning in 1966, to Rule 23 of the Federal Rules of Civil Procedure that expressly incorporate due-process protections, including notice.

Thirty-four years after its decision in *Hansberry*, this Court expressly addressed the due-process protections required under Rule 23, and the importance of notice as a necessary component for Rule 23(b)(3) classes in both *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and *Eisen v. Carlisle & Jacquelin*, *supra*. The Court concluded that Rule 23(c)(2) expressly provides for mandatory, rather than discretionary, notice to each member of a (b)(3) class and that a "court is required to direct to class members 'the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort.'" *Eisen*, 417 U.S. at 173-76 (quoting Fed.R.Civ.P. 23(c)(2)). *Accord American Pipe*, 414 U.S. at 547-48. Moreover, "in Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion." *American Pipe*, 414 U.S. at 548. *Accord Eisen*, 417 U.S. at 173.

The Court noted in *Eisen* that the Advisory Committee had explained "that the 'mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject[ ]' [and that] [t]he Committee explicated its incorporation of due process standards by citation to *Mullane* and

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sustained here by the plea of res judicata do not satisfy these requirements." *Id.* at 43-44 (internal citations omitted).

like cases." *Eisen*, 417 U.S. at 173-74. Importantly, the Court expressly rejected an argument "that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23[,]" finding that that "view has little to commend it" in light of the express command of Rule 23. *Id.* at 176-77. *See also Ortiz*, 527 U.S. at 834 n.13; *Amchem Prods.*, 521 U.S. at 617.

In *Phillips Petroleum Co. v. Shutts*, *supra*, this Court again discussed the minimum, procedural due-process protections absent members of a Rule 23(b)(3) class are owed before a forum court may exercise personal jurisdiction over them and bind them:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. . . .

Shutts, 472 U.S. at 811-12 (internal citations omitted).

In *Richards*, *supra*, because the prior adjudication had not been a class action and another ground for decision existed, this Court was not required to resolve the question of whether *Hansberry* could

reasonably "be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice." *See Richards*, 517 U.S. at 801. Rather, for the sake of argument, the Court assumed the possibility remained open and proceeded to reject the applicability of res judicata since adequate representation could not be found as discussed above. But, when making that assumption, this Court cast significant doubt as to the reasonableness of any such possibility by its "*but cf.*" citation to *Eisen*, 471 U.S. at 177; *Mullane*, 339 U.S. at 319; and other language in *Hansberry*, 311 U.S. at 40, the precise sections of which discuss the necessity of notice and the opportunity to be heard (and have been quoted above). *See Richards*, 517 U.S. at 801. *See also Taylor v. Sturgell*, 553 U.S. at 901 n. 11 ("*Richards* suggested that notice is required in some representative suits, *e.g.*, class actions seeking monetary relief . . . But we assumed without deciding that a lack of notice might be overcome in some circumstances.") (internal citations omitted). At the very least, whatever possibility that this Court in *Richards* may have held out that in some types of class actions notice might not be required, this Court's decisions in *Eisen* and *Shutts* establish that notice and an opportunity to be heard or to opt out are required in class actions under Rule 23(b)(3).

In recognition of these principles of due process at least two federal courts of appeals have refused to assert personal jurisdiction over absent members of a proposed class--the certification of which had been denied--for purposes of enjoining or estopping them from seeking class certification in another

court. These courts have concluded that upon the denial of class certification the absent members remain strangers to the litigation over whom no basis existed to assert personal jurisdiction consistent with the requirements of due process. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 141; *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006).

The necessity of the due-process protections incorporated in Rule 23 to bind absent class members was also recently stressed by this Court in *Taylor v. Sturgell*, *supra*. There, the Court was faced with the issue of whether a broad doctrine of "virtual representation" was consistent with any of the exceptions it had recognized to the rule against nonparty preclusion.

After reemphasizing the principles that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by designation or service of process, the Court acknowledged that "the rule against nonparty preclusion is subject to exceptions" and that "[r]epresentative suits with preclusive effect on non parties include *properly conducted class actions* . . ." *Taylor*, 553 U.S. at 894 (citing *Martin*, 490 U.S. at 762 n. 2; Fed.R.Civ.P.23) (emphasis added). The Court then distinguished the doctrine of virtual representation from the recognized exceptions to the rule against nonparty preclusion, *id.* at 895-906, specifying that "[i]n the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23." *Id.*

at 900-01. Thus, *Taylor* strongly indicates that absent certification pursuant to Rule 23 (or, a state-court rule providing comparable protections), the exception allowing nonparty preclusion based on a "properly conducted class action" is not applicable.

The Court reasoned:

> An expansive doctrine of virtual representation, however, would "recogniz[e], in effect, a common-law kind of class action." *Tice [v. American Airlines, Inc.]*, 162 F.3d [966,] 972 [(7th Cir. 1998)] (internal quotation marks omitted). That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in *Hansberry, Richards*, and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to "create *de facto* class actions at will." *Tice*, 162 F.3d, at 973.

Id. at 901.

C. The Eighth Circuit's Decision That the District Court Had Jurisdiction to Bind Smith and the Class He Proposes to Represent to Its Prior Ruling Denying Class Certification Violates Both Due Process and Preclusion Principles.

1. *McCollins* Never Became a Properly Conducted Class Action.

The only exception to the rule against nonparty preclusion advanced below is that applicable where there has been a "properly conducted class action." Neither Bayer nor the courts below relied on or even cited this Court's opinions in *Hansberry* and *Richards* to suggest that adequate representation might cure a lack of notice in some types of class actions. And, in light of the express dictates of Rule 23(c)(2)(B) concerning Rule 23(b)(3) classes and this Court's decisions in *Mullane*, 339 U.S. at 314; *Eisen*, 417 U.S. at 173-77; *Shutts*, 472 U.S. at 805, 807, & 811-12; *Richards*, 517 U.S. at 797-99, 800 n. 5, & 801-02; and *Taylor*, 553 U.S. at 892-94, 900-01 & n. 11, they could not reasonably do so.

Rather, Bayer and the courts below simplistically rely on *Taylor*'s recognition that "properly conducted class actions" may support nonparty preclusion. *See Taylor*, 553 U.S. at 894. This argument entirely misses the point that *Taylor* acknowledged that "properly conducted class actions" are a recognized exception to the rule against nonparty preclusion because of "the procedural safeguards contained in Federal Rule of Civil Procedure 23." *See Id.* at 894 & 901. Adequate representation is only one of the procedural safeguards afforded under Rule 23; the others include rights to notice, an opportunity to be heard or participate in the litigation (whether in person or through counsel), and to opt out or request exclusion. And, again, as to Rule 23(b)(3) classes, this Court in *Eisen* expressly rejected the argument "that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23[,]" finding that that "view has little to commend it" in

light of the express command of Rule 23. *Eisen*, 417 U.S. at 176-77.

The procedural safeguards attending a properly conducted class action are only afforded class members upon certification of a class–the true beginning of a class action. *See id.* 417 U.S. at 173-77; *Shutts*, 472 U.S. at 811-12; Fed.R.Civ.P. 23; W.Va.R.Civ.P. 23. Simply stated, an individual lawsuit requesting class certification does not become a "properly conducted class action" until class certification has been granted in accordance with the requirements set forth in Rule 23. Until that point, all that exists is an individual lawsuit with a plaintiff seeking class-action status and appointment as a class representative. Upon denial of class certification, all that remains is the individual lawsuit, the judgment in which cannot bind absent members of the once-proposed class.

As Rule 23(c)(2) & (3) and the decisions of this Court discussed above make clear, the whole point of the due-process protections afforded absent class members once all of the requirements of Rule 23(a) & (b)(3) have been met for class certification is to justify binding the absent members, who have not chosen to be excluded, to the judgment of the Court. *See also Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984) (acknowledging in regard to class actions that are certified, "[t]here is of course no dispute that under elementary principles of prior adjudication a judgment on a properly entertained class action is binding on class members in any subsequent litigation"); Restatement (Second) of Judgments § 41(1)(e) ("The representative of a class of persons similarly situated, designated as such

with the approval of the court, of which the person is a member."); Restatement (Second) of Judgments § 41(1)(e), Comment c (explaining that "[i]n a class suit, the representative of the class derives his representative authority from his situation as a member of the affected class, coupled with judicial approval of designation of the action as a class suit and of the representative's status as such"; also acknowledging that under Rule 23 "preliminary notification of other members of the class" may be required for some types of classes).

This Court explained in *American Pipe*, 414 U.S. at 548-49:

> [T]he present Rule provides that in Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23(c)(3). Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation . . . when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

(Footnote omitted).

Accordingly, denial of class certification is, fundamentally, a decision that individuals other than the named plaintiffs will not be bound by the judg-

ment in the case. To give the ultimate judgment in the case issue-preclusive effect with respect to the denial of class certification *contradicts* the denial of certification by rendering the judgment binding on absent class members in the absence of any of the procedural protections that are essential to bind nonparties.

The inconsistency of this approach with *Taylor* was recently explained by a California appellate court:

> The protections for absent class members prescribed by rule 23, of course, are afforded after a motion for class certification has been granted, not by the filing of a motion for certification that is denied. Similarly, the concept of a "properly conducted class action" suggests a class action that has been certified, following a hearing in which the named representatives have established they satisfy the requirements of rule 23, and then litigated to judgment or settled, not a individual lawsuit in which a motion for class certification was denied. Literally (and narrowly) read, therefore, *Taylor v. Sturgell, supra,* . . . would appear to preclude the use of collateral estoppel to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit . . . .

Johnson v. GlaxoSmithKline, Inc., 83 Cal. Rptr.3d 607, 618 n. 8 (Ct.App.2ndDist. 2008) (emphases added).

Similary, the ALI has explained that applying preclusive effect to the denial of class certification

would be akin to recognizing a form of "virtual representation" over nonparties currently disallowed by this Court:

> The choice of comity rather than preclusion as the focus of this Section stems from the difficulties associated with the latter with respect to a denial of class certification. The major difficulty arises from the recognition that, as to such a denial, the prospective absent class members have become neither parties to the proposed class action nor persons with any attributes of party status (such as the capacity to be bound thereby, as in a duly certified class action). Nor is there any guarantee that prospective absent class members even would be aware of the court's determination of their ability to assert claims as a class action. The notion that absent class members could be bound in an issue-preclusion sense with respect to the seeking of certification in another court, even for the same proposed class action, runs afoul of existing precedents that confine to certain narrowly defined categories the situations in which preclusion can be extended to reach nonparties. Issue preclusion arising from a denial of class certification as to would-be absent class members would approach the kind of "virtual representation" disallowed under current law.

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further explained in the Reporters' Note to the ALI Comment, none of the exceptions recognized by this Court to nonparty preclusion "extend

generally to the situation of a would-be absent class member with respect to a denial of class certification"; thus,

> Informed by the *Taylor* Court's analysis of the outer bounds for nonparty preclusion, this Section rejects the *Bridgestone/Firestone* court's pre-*Taylor* view of the issue-preclusive effect that may properly flow from a denial of class certification. Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone/Firestone* represented the minority view within the federal circuits . . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010) (citations omitted).

Bayer's argument that the Eighth Circuit's judgment below also is not inconsistent with the pre-*Taylor* decisions of the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, *supra*, and the Eleventh Circuit in *In re Bayshore Ford Trucks Sales, Inc.*, *supra*, which constituted the majority view, is a red herring because neither of those courts held that their relevant holdings, based upon due process and lack of personal jurisdiction, were solely dependent upon a finding of inadequate representation, or the absence of a finding of adequate representation, as opposed to any other basis for denying a class action under Fed.R.Civ.P. 23.[14]

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[14] *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 139 & 141 (noting that certification of settlement class had been overturned due to

(*Footnote continued*)

Furthermore, it must be stressed in this case that the district court never made an express finding of adequate representation in its decision denying class certification in *McCollins*, rather it merely presumed adequate representation existed for purposes of its discussion. The district court should not be permitted, when addressing the motion for an injunction, to make a *post hoc* judgment as to such a critical issue.[15] *See Chick Kam Choo*, 486 U.S. at 148 (cautioning that a district court is not permitted to render a *post hoc* judgment as to what an earlier order should have said). The district court's order also did not purport to bind all absent members to its decision denying certification. *See*

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failure of district court to make any of the findings required under Rule 23, including adequacy of representation, but only expressing doubt as to district court's ability to find commonality, typicality, and predominance requirements; not basing its finding of lack of personal jurisdiction on any precise reason for denial of class treatment); *In re Bayshore Ford Trucks Sales, Inc.*,471 F.3d at 1245 (although inadequate representation was reason for denial of class treatment by district court, appellate court did not base its finding of lack of personal jurisdiction on this particular reason for denial of class treatment; also citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, as support for holding).

[15] The finding of adequate representation is also rather dubious in this case because George McCollins failed to appeal either the summary judgment granted against his individual claims or the denial of class certification. Moreover, in light of the significant difference in how West Virginia and federal courts interpret and apply their own class-action rules, the decision of counsel to file the action in a manner that did not destroy diversity of citizenship and prevent removal is questionable.

Richards, 517 U.S. at 801-02; *Hansberry*, 311 U.S. at 41-43.

In short, because the denial of certification meant that *McCollins* never became a properly conducted class action, the class-action exception to the rule against nonparty preclusion does not apply to this action. Thus, collateral estoppel cannot be utilized, consistent with either due process or the common-law principles of preclusion, to bar Smith from seeking certification of a West Virginia class action. Accordingly, affirming the decision of the Eighth Circuit in this case would require this Court to "'recogniz[e], in effect, a common-law kind of class action[ ]' . . . based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in" Rule 23 and precedent of this Court, similar to the "virtual representation doctrine that allowed courts to 'create *de facto* class actions at will[ ]'" that was recently rejected by this Court in *Taylor*, 553 U.S. at 901 (citations omitted).

2. The Purported Protections Afforded Smith Are Inadequate to Satisfy Due Process.

Holding that Smith should be treated the same as George McCollins and that he has been accorded all necessary due-process protections, the Eighth Circuit adopted the reasoning of the Seventh Circuit in *Bridgestone/Firestone*. There, the court held that its prior reversal of the certification of a nationwide class action, *see In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003), could not be used to estop absent class

members from seeking certification of statewide classes in state courts. *Bridgestone/Firestone*, 333 F.3d at 766. But the court then held that absent class members *could* be estopped under the Anti-Injunction Act's relitigation exception from seeking certification of nationwide classes for the same claims in state courts, provided that they had been adequately represented by the named litigants and class counsel. *Id.* 333 F.3d at 766-69.

The reasoning supporting this latter holding is unpersuasive,[16] and the Eighth Circuit's reliance upon it in this case is misplaced. The Seventh Circuit reasoned principally that "unnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them." *Id.* at 768. To support this proposition, the Seventh Circuit cited two decisions of this Court, *Devlin v. Scardelletti*, 536 U.S. 1 (2002), and *Shutts*.

Because this Court acknowledged in *Devlin* that "[n]onnamed class members . . . may be parties for some reasons and not for others" and that they have the right to appeal certain class decisions without first intervening to obtain party status, *Devlin*, 536 U.S. at 7-10, the Seventh Circuit reasoned that absent class members could have sought a writ of certiorari from its adverse ruling denying class certification and, therefore, should be bound

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[16] The Seventh Circuit has again followed this faulty reasoning in *Thorogood v. Sears, Roebuck & Co.*, ___ F.3d ___, 2010 WL 4286367 (7th Cir. Nov. 2, 2010) (Posner, J.).

by that ruling. *Bridgestone/Firestone*, 333 F.3d at 768. The Seventh Circuit reasoned that any other approach would result in a "heads-I-win, tails-you-lose situation." *Id.* at 767. The Eighth Circuit adopted that same reasoning in this case. Pet. App. 11a. While this reasoning may be sound in cases where class certification has been granted and absent class members have been given notice of the class action and declined to opt out, it makes no sense when class certification has been denied and no notice has ever been provided to the absent members.

How are citizens in West Virginia even to know that there is a case seeking certification of a West Virginia class in a district court in Minnesota if they are never afforded notice? And, if they have no knowledge of the case, how are they supposed to appeal the district court's denial of class certification? In that situation, as this Court explained in *Mullane*, 339 U.S. at 314; *Schroader*, 371 U.S. at 211-12; and *Richards*, 517 U.S. at 799, any opportunity to be heard or ability to seek review is purely imaginary. Under these circumstances, an absent member of the class is not being prevented from getting "two bites at the apple" but is being robbed of his entitlement to a single bite. Nothing in *Devlin*, supports that draconian result or otherwise suggests that absent would-be class members are considered parties (or to be in privity with parties) in cases where certification is denied and the absentees are never even accorded notice.

Devlin stands for the narrow proposition that nonnamed class members who object to a class settlement at a fairness hearing have the right to ap-

peal the approval of the settlement without first intervening in the action for the very reason that they will be bound by the settlement despite their objections. *Devlin*, 536 U.S. at 10-11. In carving out this limited exception, the Court acknowledged the general rule that "'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.'" *Id.* at 7 (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*)). But, as Justice Scalia observed in dissent, "[n]ot even petitioner, however, is willing to advance *the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified*." *Id.* 536 U.S. at 16 n. 1 (emphasis added).

Consistent with that view (and in tension with *Bridgestone/Firestone*), the Seventh Circuit has held that a nonnamed class member is *not* a party for purposes of appealing a denial of class certification or dismissal of claims in an uncertified class action unless he intervenes. *See Wrightsell v. Cook County, Ill.*, 599 F.3d 781, 784-85 (7th Cir. 2010) ("But before certification, a class member who . . . would like to appeal the denial of certification must ask the district court for permission to intervene in the case and must do so within the statutory deadline for filing a notice of appeal."); *Daniels v. Bursey*, 430 F.3d 424, 428 (7th Cir. 2005) ("Because the class was not certified, Koresko and Schmier have no capacity to appeal just because they are members of a putative class."); *Larson v. JPMorgan Chase & Co.*, 530 F.3d 578 (7th Cir. 2008) (where named representative loses certification motion and summary judgment motion and determines not to

appeal, absent class member must promptly intervene if he desires to appeal).

Of course, permitting a nonnamed class member to intervene and appeal a ruling that would not otherwise bind him is quite different from holding that he will be bound even if he chooses not to intervene. Even if the nonnamed class member had knowledge of the prior ruling, the latter holding would violate the time-honored principle that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Richards*, 517 U.S. at 800 n. 5 (quoting *Chase Nat. Bank v. Norwalk*, 291 U.S. at 441); *Martin v. Wilks*, 490 U.S. at 763-64.

In *American Pipe*, 414 U.S. at 551-52, this Court held that the filing of a putative class action tolls the statute of limitations as to all absent class members who timely sought to intervene upon denial of class certification regardless of whether they initially relied upon the commencement of the action or were even aware that such a suit existed.[17] Relying upon its holding in *American Pipe*, the Court in *Devlin*, 536 U.S. at 10, noted that nonnamed class members are "parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." Impor-

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[17] Subsequently, in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), this Court expressly extended *American Pipe* to nonnamed class members who filed individual actions upon denial of certification rather than motions to intervene.

tantly, however, *American Pipe* explained that pending a trial court's certification decision,

> potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.

American Pipe, 414 U.S. at 552.

That absent class members may in certain circumstances receive some benefits of party status before class certification does not justify binding them as if they were actual parties in other circumstances when reasonable due-process protections have not been afforded them. *Devlin* acknowledged that "[n]onnamed class members . . . may be parties for some purposes and not for others" in explaining its rejection of the Seventh Circuit's suggestion in *In re Navigant Consulting, Inc., Securities Litig.*, 275 F.3d 616, 619 (7th Cir. 2001), that nonnamed class members cannot have it both ways, similar to the "heads I win, tails you lose" one proffered in *Bridgestone/Firestone* and relied upon by the Eighth Circuit below. *See Devlin*, 536 U.S. at 9-10 ("[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context"). This Court also rejected a similar argument in *Taylor*, 553 U.S. at 903-04, that had been raised in support of a "pub-

lic-law" exception to the rule against nonparty preclusion.

As for *Shutts*, this Court's recognition that absent class members in a Rule 23(b)(3) class action can be bound as parties when the minimum due-process rights are afforded them upon class certification hardly supports the view that they can be bound to a denial of class certification when they have *not* received those protections. Stated otherwise, a recognition that absent class members are not entitled to the full panoply of due-process rights afforded defendants for personal-jurisdiction purposes does not detract from the importance of those minimum due-process protections to which they are entitled. The significance of the rights to receive notice, appear, opt out, and be adequately represented that are afforded class members upon certification cannot be overstated. *See Shutts*, 472 U.S. at 811-12. Far from supporting preclusion, *Shutts* affirmatively forecloses it where its due-process conditions have not been satisfied.

It is no answer, moreover, to say (as the Seventh and Eighth Circuits have) that notice and opt-out rights do not accrue unless certification is granted. *See Bridgestone/Firestone*, 333 F.3d at 769; Pet. App. 14a. This circular reasoning begs the question. Indeed, it is the very fact that such rights are not afforded unless certification is granted that means a denial of class certification cannot, consistent with due process, be given binding effect on nonparty members of a never-certified class.

Finally, any suggestion that an individual suffers no harm by being deprived of the opportunity to seek certification of a statewide class in state

court because of the availability of an individual lawsuit also misses the mark. This Court, as well as countless others, has recognized that the primary, beneficent purpose of Rule 23 is "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'" due to the small monetary sums at issue as damages for each individual. *E.g.*, *Amchem Prods.*, 521 U.S. at 617 (quoting Kaplan, Prefatory Note 497). Here, if deprived of the opportunity to seek class certification, Smith will suffer irreparable harm because he will have no effective means to seek redress for his damages.

This Court has previously acknowledged that a state-law claim for relief is a property interest that is entitled to due-process protections. *See Shutts*, 472 U.S. at 807 ("a chose in action is a constitutionally recognized property interest possessed by each of the [absent class-action] plaintiffs"); *Mullane*, 339 U.S. at 313 & 315 (recognizing a cause of action to be a species of property protected by the due-process clause). When dealing with such protected property interests, this Court has held that courts are prohibited from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982). For all practical purposes, depriving Smith of the right to seek class certification under Rule 23 of the West Virginia Rules of Civil Procedure is equivalent to denying

him an opportunity to be heard upon his claimed rights.

In stark contrast, the alleged irreparable harm that respondent will be required to endure if Smith prevails is that of being forced to deal with the repetitious litigation of defending the West Virginia class action. But what presents the greatest threat of repetitious litigation and potential inconsistent judgments: dealing with one West Virginia class action or thousands of individual lawsuits brought in courts across all of West Virginia?[18] While the answer would otherwise appear obvious, respondent knows that those thousands of individual lawsuits can never economically and efficiently be brought due to the small amount of individual damages at issue. In any event, even if individual lawsuits would be economically feasible, depriving Smith of his right to utilize a rule of procedure that has been adopted by the State of West Virginia on the basis of the outcome of litigation to which he was a stranger is still a denial of due process.

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[18] If certified, a class action will not only protect Smith's rights but provide Bayer with a binding resolution of the claims of all class members who do not opt out. Bayer may prefer not to face those claims on the merits at all, but the injustice of precluding parties who have had no day in court outweighs any harm to Bayer from having to contest the litigation.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX

Constitutional Provisions, Statutes, and Rules

Rule 23 of the Federal Rules of Civil Procedure provides, in pertinent part:

> **(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> **(1)** the class is so numerous that joinder of all members is impracticable;
>
> **(2)** there are questions of law or fact common to the class;
>
> **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> **(4)** the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> ***
>
> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

***

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

***

Rule 23 of the West Virginia Rules of Civil Procedure provides, in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the pre-

requisites of subdivision (a) are satisfied, and in addition:

***

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination By Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

***

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the

member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

***

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
DEC 13 2010
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No. 09-1205

IN THE
Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a federal court that has denied class certification may enjoin members of the putative class who were adequately represented in the federal proceedings from seeking to certify the same class in state court.

CORPORATE DISCLOSURE STATEMENT

Bayer Corporation is a wholly owned subsidiary of Bayer AG. No publicly held company owns more than 10% of the stock of Bayer AG.

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INTRODUCTION

This case arises from an attempt by petitioners to relitigate in West Virginia state court certification of the same class denied certification by the federal court overseeing the Baycol multidistrict litigation. Concluding that petitioners were adequately represented in the federal certification proceedings and that they were seeking a different ruling from the West Virginia court on the same issues, the district court enjoined petitioners from seeking certification of the same class in state court, leaving them free to pursue their individual claims. The court of appeals unanimously affirmed, holding that the injunction was authorized by the All Writs Act and the relitigation exception to the Anti-Injunction Act, and that petitioners did not have a due-process right to relitigate class certification.

The decision below is correct and should be affirmed. Petitioners have not been foreclosed from seeking relief on their individual claims, but only from seeking to represent other people through a class action. Whether a class should be certified has been fully and fairly litigated in proceedings that are binding on petitioners and in which petitioners' interests were adequately represented by an identically situated named plaintiff. Procedural due process requires no more.

At bottom, petitioners' position is that class certification is a "heads-I-win, tails-you-lose" proposition. Under their theory, every unnamed plaintiff could relitigate class certification, no matter how large the putative class, no matter how many times certification had already been denied, and no matter how adequately the class members' interests were represented in the prior proceedings. This would

be a world in which defendants could never obtain a final ruling on class certification and would be forced in effect to buy litigation peace by settling. Not surprisingly, these extreme and intolerable results find no support in this Court's precedents or in principles of preclusion law or due process. The courts below did not err in rejecting petitioners' lopsided view of the law.

STATEMENT OF THE CASE

A. Baycol

Baycol is a prescription cholesterol-reducing medicine that Bayer distributed in the U.S. from 1997 to 2001 with approval of the United States Food and Drug Administration. See *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201 (D. Minn. 2003). Baycol is a "statin," a member of the same family of medications as Lipitor, Zocor, and Crestor.

Like all other statins, Baycol has been associated with muscle aches and pains, as well as more serious side effects such as rhabdomyolysis, a severe breakdown of muscle tissue in which the substances released into the bloodstream may overwhelm the kidneys. Baycol's labeling warned about these and other side effects, including the risk of using another class of drugs, fibrates, concurrently with Baycol. Ultimately, Baycol's label contraindicated concurrent use of Baycol and one fibrate, gemfibrozil, due to the risk of rhabdomyolysis. But Bayer continued to receive reports of rhabdomyolysis in patients who were being prescribed Baycol with gemfibrozil. Bayer voluntarily withdrew Baycol from the market in August 2001.

B. The Baycol MDL

Tens of thousands of lawsuits were filed after the withdrawal of Baycol. See JA 349. The Judicial Panel on Multidistrict Litigation established MDL-1431 in the United States District Court for the District of Minnesota to coordinate discovery and other pretrial matters for federal-court cases. See *In re Baycol Prods. Liab. Litig.*, No. 1431, 2001 WL 34134820, at *1–2 (J.P.M.L. Dec. 18, 2001).

In the ensuing nine years, the district court has issued more than 160 pretrial orders; supervised fact and expert discovery; and ruled on proposed nationwide and statewide classes, generic and case-specific *Daubert* motions, and motions for summary judgment. See, *e.g.*, *In re Baycol*, 218 F.R.D. 197; *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029 (D. Minn. 2007). The district court also has worked cooperatively with state courts to coordinate federal and state Baycol litigation through a joint conference, correspondence with other judges, and creation of a coordinated program for depositions of witnesses overseas. See JA 342–48.

From the first year of this litigation, the district court has supervised a settlement program for claimants who suffered rhabdomyolysis, the side effect that led to Baycol's withdrawal from the market. See JA 340–41. To date, Bayer has paid $1.17 billion to resolve 3,144 rhabdomyolysis claims. Bayer has vigorously litigated all other claims, including cases seeking economic recovery for plaintiffs, like petitioners, who benefited from and were not injured by Baycol. Bayer has won defense victories in each of the six Baycol cases tried to a jury. Of the approximately 40,000 plaintiffs who filed Baycol cases (22,500 in federal court and 17,500 in state courts), fewer than 80 still have cases pending.

Bayer has defeated numerous motions for class certification in the MDL and other jurisdictions. See Br. in Opp. 5–6 & n.4.

C. *McCollins* v. *Bayer Corp.*

In addition to managing common-issue discovery, the district court supervised case-specific discovery and motion practice in all MDL cases. In one such case, plaintiff George McCollins sought certification of a class of West Virginia Baycol purchasers, asserting claims for purported economic loss caused by Bayer's alleged breach of warranties and violation of the West Virginia Consumer Credit and Protection Act (WVCCPA), W. Va. Code § 46A-6-101 *et seq.* The case was originally filed in West Virginia state court in August 2001, but was removed on diversity grounds to the United States District Court for the Southern District of West Virginia and transferred to the Baycol MDL. JA 118; Dkt. #1; Dkt. #18.

McCollins did not claim that Baycol had injured him or had not worked as intended to reduce his cholesterol, and he "expressly disclaim[ed] any intent to seek any recovery for personal injuries suffered or which may be suffered by any class member." JA 141–42. McCollins could not have asserted any such claims; his own doctor testified that Baycol not only was "safe and effective in Mr. McCollins," but "was perfect for him." *Id.* at 243, 248.

McCollins nevertheless sought to recover for alleged "economic loss that includes the purchase price of the products," JA 149, on the theory that he and other "Class members were not receiving products of the quality, nature, fitness, or value that has been represented by Defendants," *id.* at 146. Thus, McCollins sought a refund of the amount he had paid for Baycol or statutory damages, even

though the drug had reduced his cholesterol and worked for him exactly as intended.

In November 2006, McCollins moved to remand the case from the MDL to the Southern District of West Virginia. JA 8–11. Bayer cross-moved for denial of class certification and summary judgment on McCollins's individual claims. *Id.* at 16–36. Certification of an economic-loss class was inappropriate, Bayer contended, because to establish liability under West Virginia law, each plaintiff would have to show that Baycol either injured him or did not provide him any health benefits. *Id.* at 24–25. Individual issues of fact therefore predominated, precluding certification under Rule 23(b)(3). *Id.* And as to McCollins's individual claims, Bayer argued it was entitled to summary judgment because the undisputed evidence showed that Baycol had worked for him. *Id.* at 30–34.

In response, McCollins argued that common issues predominated, and that he had made out a viable individual claim, because West Virginia law "does not require a plaintiff to prove that a product did not 'work' or that it caused a personal injury." JA 64. In McCollins's view, it was enough to show that "Baycol was 'a bad product' that 'hurt a lot of people,'" and was therefore "'different from' or 'inferior to' the product for which [he] bargained." *Id.* at 64, 67.

On August 25, 2008, the district court denied McCollins's motion to remand and granted Bayer's motion to deny class certification and enter summary judgment against McCollins. Pet. App. 35a–52a. Turning first to the class-certification issue, the district court assumed without deciding that the requirements of Rule 23(a) were satisfied, *id.* at 41a, but held that "class certification [was] not appropriate because individual issues of fact

predominate[d]," *id.* at 46a. The court rejected McCollins's argument that he could recover simply by showing that he bought an "unsafe" product. Rather, the court held, "[t]o recover under West Virginia law on any of Plaintiff's economic loss claims, . . . Plaintiff must show an actual injury proximately caused by Defendants." *Id.* at 44a.

Under this substantive liability standard, the district court concluded that "[i]ndividual evidence would be necessary as to each member of the putative class to determine whether the individual person benefitted from or was injured by Baycol." Pet. App. 45a. This would require an "in depth review of each plaintiff's medical records," including "examination of the individual's pre-existing conditions, prior statin reactions, the plaintiff's knowledge of the potential side effects associated with statins, and the warnings provided." *Id.* Because "individual issues of fact predominate[d] with respect to whether Baycol benefitted or harmed any particular person," the district court held that McCollins's economic-loss claims were "not appropriate for class certification based on Rule 23(b)(3)." *Id.* at 45a–46a.

As to McCollins's individual claims, the court reiterated that to establish a viable economic-loss claim under West Virginia law, McCollins had to "demonstrate Baycol was 'something other than what he bargained for.'" Pet. App. 50a. This McCollins could not do, because the evidence showed "that Baycol worked for him" and was therefore "exactly what he bargained for." *Id.* at 51a.

Neither McCollins nor any class member appealed the judgment, which became final on September 25, 2008.

D. *Smith* v. *Bayer Corp.*

Five days after the *McCollins* judgment became final, petitioners asked a West Virginia state court to certify the same West Virginia economic-loss class the district court had refused to certify in *McCollins*. JA 177–210. Petitioners had filed their lawsuit in the Circuit Court of Brooke County, West Virginia, in September 2001. *Id.* at 152. The case could not be removed to federal court because two West Virginia defendants were sued. Those defendants were later dismissed, but only after the one-year deadline for removal under 28 U.S.C. § 1446(b). Nor could Bayer remove the case under the Class Action Fairness Act of 2005 (CAFA), because the action was filed before CAFA's effective date. See Pub. L. No. 109-2, § 9, 119 Stat 4, 14 (2005).

The *Smith* complaint asserted personal-injury, medical-monitoring, and economic-loss claims on behalf of all West Virginia residents who had ingested Baycol. JA 152–75. During class discovery, the doctor who treated both petitioners testified that they, like McCollins, experienced no side effects from Baycol and that Baycol reduced their cholesterol. *Id.* at 259, 266.

On September 30, 2008—seven years after filing their complaint—petitioners moved for class certification, asking the West Virginia court to certify an economic-loss class of "[a]ll West Virginia residents who purchased the drug Baycol in West Virginia" with respect to the "consumer protection act claims as set forth in the complaint." JA 184. Petitioners did not seek to certify personal-injury or medical-monitoring claims, thereby narrowing their putative class to overlap with the class denied certification in *McCollins*.

Like McCollins, petitioners asserted that they could recover for economic loss under West Virginia law simply because they bought Baycol, without any individualized showing that the drug injured or did not work as intended for them. JA 186 ("If a consumer was charged for Baycol in West Virginia, then they fall into a group that deserves compensation for the improper charge perpetrated upon them."). Also like McCollins, petitioners argued that certification was appropriate because common issues predominated. *Id.* at 204–09. "[W]ith respect to liability," they claimed, "there are no individual issues." *Id.* at 207.

E. The Proceedings Below

Bayer moved the district court to enjoin petitioners from relitigating certification of a West Virginia economic-loss class. The district court held that the proposed injunction fell within the relitigation exception to the Anti-Injunction Act because (a) the economic-loss class petitioners sought to certify was identical to that denied certification in *McCollins* and presented the same threshold issue of substantive law, Pet. App. 25a–26a; (b) petitioners had not identified any substantive or procedural differences between West Virginia's class-certification rule and the federal rule, *id.* at 25a; (c) the order denying class certification was final, *id.* at 26a–29a; and (d) as unnamed members of the proposed *McCollins* class situated identically to McCollins, petitioners' interests in obtaining certification of a West Virginia economic-loss class were adequately represented in the federal proceedings, *id.* at 29a–32a.

The district court further held that it had personal jurisdiction over petitioners for purposes of enjoining them from relitigating class certification. Pet App. 32a. After concluding that the balance of equities

supported an injunction to protect its final judgment in *McCollins*, the district court enjoined petitioners from "seeking certification of an economic loss class of West Virginia Baycol purchasers." *Id.* at 34a. Nothing in the district court's order hinders petitioners from pursuing their individual claims in West Virginia state court.

The Eighth Circuit unanimously affirmed. Pet. App. 1a–19a. On *de novo* review, the panel held:

- The certification issue presented in *Smith* was identical to that in *McCollins* and was "'enmeshed'" with the same substantive issue of West Virginia law, *id.* at 7a–8a;
- Petitioners' relitigation of class certification "would undermine [the] conclusion of substantive state law properly made by the district court," *id.* at 8a;
- No relevant substantive or procedural difference between the federal standard for class certification and its West Virginia counterpart justified relitigating in state court the *McCollins* predominance holding and denial of class certification, *id.* at 7a–10a; and
- As members of the putative *McCollins* class, petitioners were bound *in personam* by the denial of class certification because any limited due-process interest they had in seeking class certification was protected by the adequate representation of McCollins, their right to appeal the *McCollins* decision, and their ability to pursue their individual claims, *id.* at 13a–15a.

Emphasizing the importance of finality to the just and efficient administration of multidistrict litigation, Pet. App. 12a, the court of appeals held that the district court properly invoked the authority of the All Writs Act and the relitigation exception to the Anti-Injunction Act, and exercised sound discretion in crafting a narrow injunction that protected its judgment in *McCollins*, *id.* at 16a–17a.

SUMMARY OF ARGUMENT

I. The courts below correctly held that the All Writs Act and the relitigation exception to the Anti-Injunction Act authorize the injunction the district court entered to protect its final judgment denying class certification in *McCollins*. Congress has expressly authorized federal courts to protect and effectuate their judgments by enjoining state-court litigation of issues that have been fully and fairly adjudicated in federal court. And the history of the relitigation exception leaves no doubt that it was properly invoked here—when Congress enacted the relitigation exception, it ratified a prior decision of this Court upholding an injunction prohibiting unnamed class members from relitigating in state court issues that had been decided in a prior federal class action.

II. The courts below also correctly concluded that petitioners are collaterally estopped from relitigating class certification. Petitioners seek certification of the same class on the same legal theory that the district court in *McCollins* rejected. Critically, petitioners seek a different ruling from the West Virginia court on a substantive issue of law decided in *McCollins*. That fact alone shows that petitioners are seeking to relitigate the "same issue" and distinguishes all the authorities on which they rely.

Moreover, even as to the procedural aspects of the *McCollins* class-certification ruling, the same issues are presented in *Smith*. The Court should reject petitioners' argument that a different issue is presented simply because the certification issue in *Smith* arises under West Virginia's substantively identical counterpart to Federal Rule 23(b)(3). Because the controlling legal principles are the same under both rules, the same issues are presented. Petitioners' contrary approach, which would allow a party to escape preclusion based on the mere possibility that another court might apply its rule differently, finds no support in the principles or policies of preclusion law and ignores the strong federal policies against duplicative state-court class actions.

III. Petitioners are bound by the denial of class certification as adequately represented members of the putative *McCollins* class. This Court has long treated unnamed members of an uncertified class as parties for a variety of purposes. And just as unnamed class members are entitled to the benefits of a favorable decision on class certification, so they should be bound by an unfavorable one. Otherwise every unnamed class member could relitigate class certification, producing the very multiplicity of actions Rule 23 was designed to avoid.

Petitioners also are bound by the judgment under basic principles of nonparty preclusion. Because petitioners' interests in certifying a West Virginia economic-loss class are identical to McCollins's, and because McCollins litigated the certification issue in a representative capacity on behalf of a class, this case satisfies the criteria the Court has delineated for nonparty preclusion based on adequate representation. Contrary to petitioners' contention, preclusion

does not turn on whether the class was certified. The district court's ruling was a binding and essential determination on a key aspect of a putative class proceeding. And this Court's cases recognized the preclusive effect of class judgments long before Rule 23's formal procedures for class certification were first adopted in 1966. As those cases show, adequate representation is the touchstone of preclusion in class actions.

IV. Precluding petitioners from relitigating class certification does not violate due process. The courts below correctly rejected petitioners' contention that they are not subject to the personal jurisdiction of the district court. And this Court has never held that, as a matter of procedural due process, notice and an opportunity to opt out are necessary to bind unnamed class members even to a judgment on the merits of their claims, let alone to a ruling that prevents them from invoking a particular procedural device.

The appropriate procedural due process analysis balances the individual interests at stake and the risk of an erroneous deprivation of those interests against society's interests in avoiding the cost and burden of the additional procedures petitioners' propose and in preventing serial relitigation of class certification. That balance overwhelmingly favors preclusion. Petitioners' only protected property interest is in their claims themselves, and that interest has not been impaired, much less extinguished, as petitioners remain free to pursue their individual claims. Once an adequate representative has fully and fairly litigated class certification, additional procedures would not increase the probability of a "correct" result, but would only invite gamesmanship and inconsistent results. And society has compelling interests in

achieving litigation finality and avoiding the abusive practices to which petitioners' proposed rule would inevitably give rise.

ARGUMENT

I. CONGRESS EXPRESSLY AUTHORIZED FEDERAL COURTS TO PROTECT AND EFFECTUATE THEIR JUDGMENTS BY ENJOINING DUPLICATIVE STATE-COURT LITIGATION.

Two statutes frame this case: the All Writs Act and the Anti-Injunction Act. Before turning to the specific issues petitioners raise, a brief overview of these statutes may be helpful.

A. The All Writs Act provides courts with the affirmative authority to protect the preclusive effects of their judgments by enjoining duplicative litigation in other courts. Congress provided express statutory authority for such injunctions by empowering federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977).

The All Writs Act does not confer subject-matter jurisdiction. *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33 (2002). However, no independent source of subject-matter jurisdiction is necessary to enter a protective injunction; the jurisdiction the court had when it entered the original judgment is enough.

Local Loan Co. v. *Hunt*, 292 U.S. 234, 239 (1934). Here, for example, the district court's subject-matter jurisdiction over the *McCollins* case sufficed to support the injunction. Pet. App. 15a.

Although petitioners were unnamed parties to *McCollins*, the power conferred by the All Writs Act also extends to "persons who, though not parties to the original action," are "in a position to frustrate the implementation of a court order or the proper administration of justice." *N.Y. Tel.*, 434 U.S. at 174; see also *United States* v. *Int'l Bhd. of Teamsters*, 266 F.3d 45, 50 (2d Cir. 2001) (per curiam).

B. The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. This last exception, commonly referred to as the "relitigation exception," is "founded in the well-recognized concepts of *res judicata* and collateral estoppel," and is "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988).

Along with the other exceptions, the relitigation exception was added to the Anti-Injunction Act in response to this Court's decision in *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118 (1941). The Court in *Toucey* had held that federal courts lacked authority to enjoin state-court proceedings to protect the *res judicata* effect of their judgments, repudiating a line of earlier cases that had upheld such authority. See *id.* at 143–54 (Reed, J., dissenting). Prominent among the earlier cases recognizing a relitigation exception was *Supreme Tribe of Ben-Hur* v. *Cauble*,

255 U.S. 356 (1921), which had upheld an injunction prohibiting unnamed class members from relitigating in state court claims that had been adjudicated in a prior federal class action. *Id.* at 363–67.

Justice Reed wrote a forceful dissent in *Toucey*, finding no justification for jettisoning the *Ben-Hur* line of cases:

> Th[e] alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties, but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field.

Toucey, 314 U.S. at 144 (Reed, J., dissenting) (footnote omitted).

Congress responded by amending the Anti-Injunction Act in 1948 to grant federal courts express authority "to enjoin relitigation of cases and controversies fully adjudicated by such courts." H.R. Rep. No. 80-308, at A181–82 (1947). The Reviser's Note made clear that the amendment "served not only to overrule the specific holding of *Toucey*, but to restore 'the basic law as generally understood and interpreted prior to the Toucey decision.'" *Mitchum* v. *Foster*, 407 U.S. 225, 236 (1972) (footnote omitted). This Court has accordingly held that "the criteria to

be applied" in interpreting the exceptions to the Anti-Injunction Act "are those reflected in the Court's decisions prior to *Toucey*." *Id.* at 236-37.

Contrary to petitioners' suggestion, then, this case does not present any danger of "'enlarg[ing]'" the exceptions to the Anti-Injunction Act through "'loose statutory construction.'" Pet. Br. 14. Rather, this case falls squarely within the core of the relitigation exception—an express statutory exception embodying Congress's considered judgment that "federal courts should be authorized to protect their judgments against relitigation in state courts, rather than leave successful federal court litigants to the assertion of collateral estoppel defenses in subsequent state court actions." *Smith* v. *Woosley*, 399 F.3d 428, 432 (2d Cir. 2005).

There can thus be no doubt that Congress contemplated and sanctioned exactly the kind of injunction at issue here, to protect and effectuate the federal court's judgment. And contrary to petitioners' suggestion that the reasons for the relitigation exception apply only in federal-question cases, see Pet. Br. 17–18, a federal court's judgment in a diversity case is undoubtedly part of the "federal law" whose supremacy and effectiveness the relitigation exception is designed to ensure. Even if no substantive question of federal law is presented, the concerns animating the constitutional grant of diversity jurisdiction, such as the potential for local prejudice against out-of-state defendants, are directly implicated when the losing party in a federal diversity action seeks to relitigate the same matters in state court. See generally *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1188, 1191 (2010).

A litigant who seeks to enforce the preclusive effect of a federal judgment also cannot afford to wait for

the state court to rule on the preclusion issue before seeking federal relief. Under *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518 (1986), if the state court rules on the preclusion issue, its judgment on that issue itself becomes preclusive and is entitled to full faith and credit in federal court. *Id.* at 525. If the state court unjustifiably rejected the preclusion defense, its ruling would thus "effectively proscrib[e] a federal court from issuing a subsequent injunction to effectuate its judgment," *Fernández-Vargas* v. *Pfizer*, 522 F.3d 55, 68 (1st Cir. 2008), and "the only federal recourse (in non-removable suits) would be the uncertain prospect of certiorari review" by this Court, *Smith*, 399 F.3d at 432.

II. PETITIONERS SEEK TO RELITIGATE THE SAME ISSUE DECIDED IN *McCOLLINS*.

The doctrine of issue preclusion embodies the "fundamental precept of common-law adjudication" that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies." *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (internal quotation marks and alterations omitted). This doctrine is "central to the purpose for which civil courts have been established," and protects parties "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153–54. Without preclusion, "'an end could never be put to litigation.'" *San Remo Hotel, L.P.* v. *City & County of S.F.*, 545 U.S. 323, 336–37 (2005) (quoting *Hopkins* v. *Lee*, 19 U.S. (6 Wheat.) 109, 114 (1821)).

Petitioners contend that they cannot be precluded from relitigating class certification under federal

common law, which they assert incorporates West Virginia preclusion law under *Semtek International Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001), because *McCollins* involved different issues and different parties, and because petitioners did not personally have the opportunity to litigate class certification in *McCollins*.

Not only are petitioners wrong as a matter of West Virginia law, they also ignore the powerful federal interests that support the application of uniform federal preclusion law in this context. Unlike in *Semtek*, where the prior federal judgment rested solely on state-law grounds, *id.* at 506–09, the issue sought to be relitigated here is a federal procedural ruling, and "[t]here are strong federal interests arising from the interdependence of preclusion with federal procedure," 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4472, at 380 (2d ed. 2002) (Wright & Miller).

Like the preclusive effect of a federal ruling on a question of federal substantive law, the preclusive effect of a federal procedural ruling should be governed by a uniform federal rule of decision. See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 762–63 (1986). That is particularly true for rulings under Rule 23, which "clearly contemplates a uniform federal rule on who is bound by [a class-action] suit." Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 763 (1976). And the federal rule of decision should be informed by the strong federal interests in avoiding needless relitigation of class-certification determinations. See *infra*, 28–30.

A. Petitioners cannot dispute that they seek to certify the same economic-loss class of West Virginia Baycol purchasers on the same legal theory that the district court in *McCollins* rejected. The propriety of such a class was already fully and fairly adjudicated in *McCollins*.

In denying certification of an economic-loss class in *McCollins*, the district court held that to recover for economic loss under West Virginia law, a plaintiff must show that Baycol caused her personal injury or did not work for her. Pet. App. 43a–45a. Accordingly, the court held that individual issues of fact predominated over common issues and that a class action therefore could not be maintained under Rule 23(b)(3). *Id.* at 45a.

Petitioners' motion for class certification in *Smith* seeks a different ruling from the West Virginia court on each of these issues. Directly contrary to the district court's rulings in *McCollins*, petitioners argue that they can recover for economic loss under West Virginia law simply because they bought Baycol, without any individualized showing that Baycol injured or did not work for them. JA 186 ("If a consumer was charged for Baycol in West Virginia, then they fall into a group that deserves compensation for the improper charge perpetrated upon them."). And because petitioners contend that "with respect to liability, there are no individual issues," they assert that common issues predominate and a class can be certified. *Id.* at 207; see also *id.* at 208 ("The proof of the violations of the act will be identical with respect to each class member.").

Petitioners' contention that their class-certification motion in *Smith* presents different issues than those decided in *McCollins* defies both logic and common sense. Without a doubt, petitioners are seeking to

relitigate "what is essentially the same dispute." *Restatement (Second) of Judgments* § 27, cmt. c. (1982).

B. Petitioners seek to relitigate a substantive ruling of law that underpins the denial of class certification in *McCollins*. The *McCollins* court held that under West Virginia law, liability cannot be established as to all members of the putative class through common proof because each class member must show injury. Pet. App. 45a–46a. Petitioners contend that they do not have to prove injury to establish liability. JA 186, 207–08. Petitioners do not and cannot contend that this is a different issue in federal and state court. Instead, they argue that they are entitled to relitigate this substantive legal ruling for two reasons.

1. Petitioners argue that the district court should not have decided any substantive issues because *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974), forbids consideration of substantive issues at the certification stage. Not so. *Eisen* merely "forbids courts from considering, as part of the certification analysis under Rule 23, which side will ultimately prevail." 5 James Wm. Moore, *Moore's Federal Practice* § 23.84[2], at 23-387 (3d ed. 2010). It does not "prevent any inquiry into substantive issues at the certification stage." *Id.* at 23-387–88. Indeed, it is well settled that "[a] judge must delineate what issues of law exist to determine whether they are common to the class." Pet. App. 8a; see also *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978) (class certification "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'"); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

In denying class certification, the district court in *McCollins* did not "resolve on the merits the substantive claims of a plaintiff." Pet. Br. 28. It simply held that to establish an essential element of his case-in-chief, each plaintiff would have to show that Baycol injured or did not work for him. Petitioners now seek in effect to overturn that substantive ruling in *Smith*.

2. Petitioners and their *amicus* American Association for Justice (AAJ) also dispute the district court's conclusion that each class member would have to present individual evidence of injury to establish liability under West Virginia law. See Pet. App. 10a; AAJ Br. 17–24. This argument is irrelevant: Issue preclusion does not depend on the correctness of the prior decision. *E.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 101 (1980) (rejecting "any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous"); *Restatement* § 28, cmt. j.

The argument also is wrong: The district court relied on the West Virginia statute and the West Virginia Supreme Court decision AAJ claims the district court ignored. Pet. App. 44a (citing W. Va. Code § 46A-6-106 and *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003)); see also *Baycol Prod. Litig.*, 218 F.R.D. at 213 (discussing *Rezulin* in denying certification of nationwide economic-loss class).

Rezulin explains that under the West Virginia consumer-fraud statute, a plaintiff must establish a "'loss'"—"held synonymous with a deprivation, detriment and injury." 585 S.E.2d at 74–75. That is wholly consistent with the district court's holding that to establish liability each plaintiff must show either that he was injured by Baycol or that Baycol

did not provide him any health benefits. Pet. App. 43a.

C. Because petitioners seek a different ruling on the same substantive issue of law that was decided in *McCollins*, this Court need go no further to conclude that the "same issue" is presented in *Smith*. But even as to the procedural aspects of the *McCollins* certification ruling, petitioners' certification motion in *Smith* presents the same issues. The predominance inquiry is the same in both jurisdictions because the controlling legal principles are the same. And under the plain language of both Federal Rule 23 and West Virginia Rule 23, a class cannot be certified where, as here, individual issues predominate.

1. Petitioners assert that a class-certification issue arising under a state certification rule necessarily presents a different issue—even if the state rule is identical to Federal Rule 23—because a state court may, in its discretion, "construe and apply its rules in a different manner with a different result." Pet. Br. 25. In support of this proposition, petitioners cite *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998), *J.R. Clearwater Inc.* v. *Ashland Chemical Co.*, 93 F.3d 176 (5th Cir. 1996), and § 2.11 of the ALI's new Principles of the Law of Aggregate Litigation, which in turn relies exclusively on the reasoning of *General Motors* and *J.R. Clearwater*.

None of these authorities supports petitioners' claim that a substantive holding of law made by a federal court in denying class certification can be relitigated in state court. In fact, an earlier draft of the ALI Principles provided that preclusion should apply where, as here, "the initial court denies aggregate treatment on grounds applicable across the two fora." *Principles of the Law of Aggregate*

Litigation § 2.11, cmt. b (Tentative Draft No. 1 Apr. 7, 2008) (ALI Tent. Dr.). The requirements of the WVCCPA are such grounds.

Petitioners' authorities are also unpersuasive on their own terms. Different issues are not presented simply because federal and state courts might arrive at different decisions applying identical class-certification rules. To the contrary, courts have repeatedly held that if "careful examination of the controlling legal principles" in both jurisdictions reveals "that the standards are the same, or that fact findings have the same effect under either standard," then "the same issue is presented by both systems of law." 18 Wright & Miller, *supra* § 4417, at 461–62 & n.65 (collecting cases); see also *id.* § 4425, at 656–57 ("Identity of the issue is established by showing that the same general legal rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules.") (footnote omitted). A party should not be able to "avoid the preclusive effect of a denial of class certification rendered by a federal court . . . by filing suit against the same party in . . . state court and pointing to largely illusory differences between statutes that are designed for essentially identical purposes." *Lee* v. *Criterion Ins. Co.*, 659 F. Supp. 813, 823 (S.D. Ga. 1987).

Petitioners' approach also finds no support in the purposes of preclusion doctrine. Preclusion law is not designed to allow every jurisdiction to apply its own law or procedures to a given dispute. Rather, it is a doctrine of repose—a value that "encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." *Univ. of Tenn.* v. *Elliot*, 478 U.S. 788, 798 (1986); see also *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107–08

(1991). The core purposes of issue preclusion would be defeated by permitting the sort of jurisdictional hopscotch petitioners propose. A plaintiff "ought not to have unlimited bites at the apple until he can convince a single district court that he qualifies as a class representative." *Van-S-Aviation Corp.* v. *Piper Aircraft Corp. (In re Piper Aircraft Dist. Sys. Antitrust Litig.)*, 551 F.2d 213, 219 (8th Cir. 1977).

2. Contrary to petitioners' claim, Pet. Br. 24, the procedural nature of class certification should not defeat preclusion. Although a procedural ruling generally does not preclude litigation of *the merits of a claim* if the procedural defect is cured in a subsequent suit, the procedural ruling does preclude an attempt to relitigate *the same procedural issue*. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999); *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192–93 (D.C. Cir. 1983) (Scalia, J.). Thus, "[t]he same question of jurisdiction, venue, or party joinder cannot be reopened in a second action." 18 Wright & Miller, *supra* § 4418, at 468; see also 18A Wright & Miller, *supra* § 4435, at 139 (same); *id.* § 4437, at 184–85 ("Dismissal for failure to satisfy a procedural precondition . . . . should preclude relitigation of the same precondition issue."); *Restatement* § 10, cmt. d (personal-jurisdiction rulings preclusive); *id.* § 12 (subject-matter jurisdiction rulings preclusive); *id.* § 20, cmt. b (venue rulings preclusive).[1]

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[1] Petitioners also assert, in passing, that the only "ruling essential to the final judgment was that granting summary judgment against Mr. McCollins." Pet. Br. 24. By this petitioners apparently mean to suggest that the "necessarily decided" requirement for issue preclusion was not met because the class-certification issue was collateral to the merits of McCollins's claims. But petitioners have never before raised this issue, and they did not present it in their petition for certiorari.

This is consistent with *Chick Kam Choo*. The Court there held that the federal and state *forum non conveniens* issues were not the same because Texas courts "operate[d] under a broad 'open-courts' mandate" and would therefore have applied "a significantly different *forum non conveniens* analysis." 486 U.S. at 148–49. The Court did not adopt the rule urged by petitioners here, that preclusion is inappropriate because federal and state courts might apply the same standard differently or because the federal ruling is procedural.

Petitioners have identified no difference in the class-certification standards applied under federal and West Virginia law. Apart from a few minor stylistic differences, the rules themselves are identical. And the West Virginia courts, which generally rely on federal case law under Federal Rule 23 in interpreting West Virginia Rule 23, have not articulated any different legal principles with respect to predominance. Petitioners cite *Rezulin*, but it held only that "a difference in claims over the amount of damages is not sufficient to defeat class certification in an action for a refund" under the WVCCPA.[2] 585 S.E.2d at 75. The proposition that variations in damages do not defeat class certification is ubiquitous

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The argument is therefore waived. *See* Sup. Ct. R. 14.1(a). It is also wrong: A ruling on a procedural issue collateral to the merits of a claim precludes subsequent attempts to relitigate the same procedural issue. *E.g.*, 18A Wright & Miller, *supra* § 4435, at 134.

[2] The *Rezulin* court also concluded that common issues predominated with respect to medical-monitoring claims because such claims do not "rest upon the existence of present and proven physical harm." 585 S.E.2d at 73. Here, no medical-monitoring claims are at issue.

in federal case law interpreting Rule 23[3]—indeed, for that proposition *Rezulin* cited *only federal cases*. *Id.* *Rezulin* therefore does not establish any difference in the controlling legal principles under West Virginia's Rule 23. And the district court in *McCollins* did not base its predominance determination on any questions as to *damages*. It denied certification because individualized evidence was necessary to establish *liability*.

That is not, as petitioners contend, a "distinction without significance." Pet. Br. 26 n.11. Petitioners never contended in their motion for class certification in *Smith*, or at any stage of the proceedings below, that a class could be certified even if each class member was required to establish liability individually. Petitioners' present assertion that a class could be certified in any event, see *id.* at 26–27, conflicts with West Virginia class-certification law that a court may not certify a class when individual issues as to liability predominate, see, *e.g.*, *Perrine* v. *E.I. Du Pont de Nemours & Co.*, 694 S.E.2d 815, 859–60 (W. Va. 2010) (approving trial court's holding that, when considering predominance, "'[c]ourts should particularly focus on the liability issue'").

3. At bottom, petitioners' argument rests on the contention that a denial of class certification can never have preclusive effect because rulings on class certification involve some element of discretion that a subsequent court might exercise in a different fashion. This position represents a fundamental misunderstanding of issue preclusion. A ruling no more loses its preclusive effect merely because it involves some element of discretion than does a

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[3] *See, e.g.*, *Seijas* v. *Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010); *Blackie* v. *Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).

finding of fact merely because it could come out differently if considered anew by a subsequent court. Both types of ruling are reviewed deferentially on appeal because there is room for disagreement about how the trial court should exercise its judgment (in the case of discretionary rulings) or how conflicting evidence should be interpreted (in the case of factual findings). But discretionary rulings, no less than factual findings, are entitled to preclusive effect when they are fully and fairly litigated and essential to a judgment that binds the parties. See, *e.g.*, 18A Wright & Miller, *supra* § 4445, at 305 (interlocutory-injunction rulings preclusive if "it appears that nothing more is involved than an effort to invoke a second discretionary balancing of the same interests"); *id.* § 4447, at 322 ("core concepts of preclusion" prevent multiple applications for discretionary post-judgment relief).

What is more, as this Court has recently made clear, the discretion that inheres in the certification decision is limited and constrained. Rule 23 provides trial courts with discretion in determining whether "the Rule's criteria are met" regarding the predominance of common over individual issues and other requirements. *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010). But Rule 23 does not give the trial court a free-floating mandate to grant or deny certification on the basis of considerations not comprised within Rule 23's clear terms. See *id.*

Here, the district court determined that individual issues predominated because unnamed class members would have to prove injury on an individual basis to establish their claims. Pet. App. 45a–46a. And if individual issues predominate, a court has no discretion to certify a class under either Federal Rule

23(b)(3) or its West Virginia counterpart. See Fed. R. Civ. P. 23, Adv. Comm. Note; Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)(3)[2][a], at 553 (3d ed. 2008).

4. For these reasons, application of traditional preclusion principles shows that the same procedural issue is presented in *Smith*. That result is further supported by the strong federal policies underlying Rule 23, the MDL statute, and CAFA.

Rule 23 is designed to avoid duplicative litigation by "establish[ing] a procedure for the adjudication of common questions of law or fact." *Cooper* v. *Fed. Reserve Bank*, 467 U.S. 867, 880–81 (1984) (relying on policies underlying Rule 23 in crafting federal common-law preclusion rules). But if a determination under Rule 23 is treated as a different issue from certification of an identical class under an identical state class-certification rule, as petitioners argue, the same plaintiff or the same plaintiff's lawyer could effectively override every federal denial of class certification by relitigating the issue in other fora until he or she obtained the desired outcome. See, *e.g.*, *Thorogood* v. *Sears, Roebuck & Co.*, No. 10-2407, 2010 WL 4286367, at *6–7 (7th Cir. Nov. 2, 2010), *reh'g denied*, 2010 WL 4890698 (Dec. 2, 2010); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–67 (7th Cir. 2003). Adopting petitioners' theory would thus be "tantamount to requiring that every member of the class be permitted" to litigate class certification. *Cooper*, 467 U.S. at 880.

These federal concerns are magnified in the context of multidistrict litigation under 28 U.S.C. § 1407, where "[c]ontrol over the proliferation of cases and coordination of multiple claims is crucial to effective

management of complex litigation." David F. Herr, *Annotated Manual for Complex Litigation* 300 (4th ed. 2010). A federal preclusion rule that would allow relitigation of identical issues finally adjudicated by an MDL court would undermine the court's ability to accomplish the policies of efficiency, fairness, and uniformity underlying the MDL statute. See 15 Wright & Miller, *supra* § 3861, at 358 (the objective of § 1407 is "to assure the just and efficient conduct" of multidistrict actions and to avoid "conflict and duplication") (internal quotation marks omitted).

Finally, the enactment of CAFA reflects Congress's judgment that duplicative state-court class actions serve no useful purpose, harm interstate commerce, and cause an "enormous waste" of party and judicial resources by forcing "multiple judges of different courts [to] spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." S. Rep. No. 109-14, at 23 (2005).[4] The same policies that Congress found

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[4] CAFA was the result of longstanding and widespread concern about "[o]ne of the most troubling problems in the modern class-action arena": "the filing of multiple, competing class actions in state and federal courts all directed toward the same conduct or activities, which are alleged to have caused harm that is multistate, if not national, in scope." 7B Wright & Miller, *supra* § 1798.1, at 231; *see also, e.g.*, Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, [2002] 32 Envtl. L. Rep. (Envtl. Law Inst.) 10984 (Aug. 2002); Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. Legis. 483 (2000).

Congress responded to the numerous calls for reform by establishing an additional basis for federal jurisdiction in class actions in which the matter in controversy exceeds $5,000,000 and diversity exists between any member of the putative class

supported the expansion of federal jurisdiction in CAFA should be weighed here in determining under federal common law whether a federal judgment denying class certification may be relitigated in state court.

For these reasons, "[i]t is incompatible with federal law for states to ignore federal [class-certification] judgments" as petitioners propose. *Bridgestone*, 333 F.3d at 768.

D. Petitioners also suggest that the issues in *Smith* are not the same because, in addition to their statutory fraud claim, they have "asserted a common-law claim of fraud that was not alleged in *McCollins*." Pet. Br. 19. But petitioners did not even mention their common-law fraud claim in their opposition to the injunction below, see JA 308-327, and they have not at any stage of the proceedings developed an argument as to why the presence of that claim matters to the preclusion analysis. The issue is therefore waived. See *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

Moreover, the addition of a common-law fraud claim does not present a new issue because common-law fraud, like statutory fraud, requires individual proof of injury that predominates over common

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and a defendant. 28 U.S.C. § 1332(d)(2). These include single-state class actions arising under state law where the defendant's conduct "could be alleged to have injured customers throughout the country or broadly throughout several states." S. Rep. No. 109-14, at 40; *see also id.* at 36 (describing example of "a nationally distributed pharmaceutical product [that] is alleged to have caused injurious side-effects"). Because such cases "involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit," Congress concluded that they "properly belong in federal court." *Id.* at 5.

issues. See, *e.g.*, *Legg* v. *Johnson, Simmerman & Broughton, L.C.*, 576 S.E.2d 532, 539 (W. Va. 2002) (per curiam). Because the common-law fraud claim presents a bar to certification that is "functionally identical" to that presented by the statutory consumer-fraud claim, the predominance issue remains the same. See *Bryan* v. *BellSouth Commc'ns, Inc.*, 492 F.3d 231, 239 (4th Cir. 2007) (upholding injunction because the claim asserted in state court was "functionally identical" to the claim dismissed by the federal court and therefore presented the same issues); *Kidder, Peabody & Co.* v. *Maxus Energy Corp.*, 925 F.2d 556, 565 (2d Cir. 1991) (upholding injunction prohibiting party from relitigating claims, "'no matter how denominated,'" that had already been decided in federal court because they presented the same issues); cf. *Restatement* § 27, cmt. c., ill. 4 (a new theory of liability based on the same facts presents the same issue).

In sum, the issues presented by petitioners' class-certification motion in *Smith* are the same issues the district court decided when it denied class certification in *McCollins*. "The denial of class certification stands as an adjudication of one of the issues litigated." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 (1980). It should preclude subsequent attempts to relitigate the same issue.

III. AS ADEQUATELY REPRESENTED UNNAMED PARTIES IN *McCOLLINS*, PETITIONERS ARE BOUND BY THE DENIAL OF CLASS CERTIFICATION.

Petitioners also contend that they are entitled to relitigate class certification because they were not named parties in *McCollins*. Pet. Br. 18. As adequately represented members of the putative *McCollins* class, however, petitioners are bound by

the judgment denying class certification for two reasons: (A) they should be considered "parties" to the class-certification proceeding for the issues essential to the ruling on class certification; and (B) even if they were not parties, they are bound under principles of nonparty preclusion.

A. Petitioners proceed from the premise that they were not "parties" to the *McCollins* action. But as this Court has explained, unnamed class members "may be parties for some purposes and not for others," because the "label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin* v. *Scardelletti*, 536 U.S. 1, 9–10 (2002).[5]

Thus, for example, the Court has held that the filing of a putative class action tolls the statute of limitations for all putative class members because "the claimed members of the class [stand] as parties to the suit until and unless they receiv[e] notice thereof and [choose] not to continue" or until class certification is denied. *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 550–56 (1974); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350–51 (1982). A contrary rule, the Court explained, would produce "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 . . . [was] designed to avoid." *Parker*, 462 U.S. at 351.

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[5] As Justice Stevens observed 30 years ago, this Court has described unnamed members of an uncertified class variously as "parties in interest," *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853); as "interested parties," *Ben-Hur*, 255 U.S. at 366; and as "absent parties," *Hansberry* v. *Lee*, 311 U.S. 32, 42–45 (1940). *See Roper*, 445 U.S. at 343 n.3 (Stevens, J., concurring).

In addition, the Court has held that unnamed class members of an uncertified class may intervene after final judgment to appeal the denial of class certification. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394–96 (1977). The Court reasoned that although a case is "'stripped of its character as a class action' upon denial of certification," "'it does not follow that the case must be treated as if there never was an action brought on behalf of absent class members.'" *Id.* at 393 (alteration omitted).[6]

These cases show that unnamed class members may be treated as parties, even if a class is never certified, and that their party status in a given procedural context should be determined in light of the "goals of class action litigation," particularly the goal of avoiding an inefficient multiplicity of actions. *Devlin*, 536 U.S. at 11; see also *Am. Pipe*, 414 U.S. at 551 (emphasizing that a "multiplicity of activity" would "frustrate the principal function of a class suit"); *Parker*, 462 U.S. at 350 (emphasizing the "inefficiencies [that] would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification").

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[6] Petitioners argue that unnamed class members may not appeal the denial of class certification unless they first intervene. Pet. Br. 51–52. Even if that were true, it would not follow that unnamed class members are not bound by the outcome of a class proceeding in which their interests were adequately represented. But petitioners' premise is also wrong: *Devlin* strongly suggests that if unnamed class members are bound by the denial of class certification, then they may appeal without intervening. *See* 536 U.S. at 10 ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement.").

The goals of class-action litigation overwhelmingly favor treating unnamed class members as parties to class-certification proceedings in which they are adequately represented. Otherwise unnamed class members could relitigate class certification *ad infinitum*, producing the very multiplicity of actions Rule 23 is designed to avoid. A class action may be filed on behalf of thousands, or in some nationwide class actions, hundreds of thousands or even millions of putative class members. Under petitioners' view of the law, every one of them would have the right to relitigate the denial of class certification, free and clear of any preclusion defense. There would be no end to litigation.

Petitioners also ignore the fact that unnamed class members *are* treated as parties to the *grant* of class certification: If certification is granted, they are entitled to reap the benefits of that decision by participating in a favorable class judgment. Petitioners thus seek the sort of "'one-way intervention'" the drafters of Rule 23 rejected when they concluded that unnamed class members should not be permitted "to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Am. Pipe*, 414 U.S. at 547. Petitioners must take the bitter with the sweet. "Just as they receive the fruits of victory, so an adverse decision is conclusive against them." *Bridgestone*, 333 F.3d at 768.

B. Even if unnamed class members are not parties to the class certification decision, they are nonetheless bound under basic principles of nonparty preclusion. As the Court recently explained in *Taylor* v. *Sturgell*, 553 U.S. 880 (2008), "a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who

was a party to the suit," and "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions." *Id.* at 894 (internal quotation marks and alterations omitted).

Petitioners do not seriously dispute that they were adequately represented in *McCollins*.[7] Nor could they. As *Taylor* explained, a party's representation of a nonparty is "adequate" for preclusion purposes if (1) "the interests of the nonparty and her representative are aligned"; and (2) "either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 900. Both requirements are satisfied here.

First, petitioners' interests are exactly aligned with McCollins's. Like McCollins, they did not suffer any injury from Baycol and in fact benefited from it. Petitioners have "made no attempt to argue that Mr. McCollins' interests conflicted with their interests." Pet. App. 31a. And the district court expressly found that petitioners "were adequately represented" in *McCollins*, observing that "counsel for the *McCollins*

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[7] In a footnote, petitioners suggest that McCollins's representation was "dubious" because he did not appeal and because he did not defeat removal by joining a nondiverse defendant. Pet. Br. 47 n.15. These suggestions are meritless. A decision not to appeal, without more, does not show inadequate representation, particularly where, as here, no attempt has even been made to show that meritorious grounds for appeal existed. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 148 (3d Cir. 2005); *Vines* v. *Univ. of La.*, 398 F 3d 700, 711–12 (5th Cir. 2005). And the idea that failure to engage in abusive joinder shows inadequate representation needs no response.

plaintiffs vigorously argued in favor of class certification before this Court." *Id.* at 32a.[8]

Second, McCollins was acting in a representative capacity when he sought class certification. Moving for class certification is an inherently representative act. And the court also took care to protect the interests of unnamed class members by attending to the procedural requirements of Rule 23 that must be met before a class may be certified. A major function of a class-certification decision is to decide whether using that procedural device serves the interests of all people within the proposed class. "As a conceptual matter and in terms of practice . . . the class-certification determination is made as to the entire proposed class, not as to individual class members." ALI Tent. Dr. § 2.11, Reporter's Note, cmt. c. "It thus is appropriate to treat absent class members as parties for issue-preclusion purposes, if only when the determination said to have issue-preclusive effect is the class-certification determination itself." *Id.*

Petitioners do not dispute that *Taylor*'s two requirements are met, but instead assert that they

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[8] Citing *Chick Kam Choo*, petitioners contend that the district court should not be permitted "to make a *post hoc* judgment" regarding adequate representation. Pet. Br. 47. Petitioners mischaracterize *Chick Kam Choo*, which said only that an injunction must be limited to issues that "actually have been decided by the federal court and may not encompass additional issues based on "a *post hoc* judgment as to what the order was *intended* to say." 486 U.S. at 148. *Chick Kam Choo* would thus be on point only if the district court had made a *post hoc* judgment as to the propriety of class certification, which it did not. And there is no reason that a court should not be able to make a retrospective assessment of adequacy, particularly where, as here, the certification proceedings and the injunction proceedings were separated by only a matter of months and considered by the same judge.

cannot be bound because certification was denied and *McCollins* therefore never became a "'properly conducted class action.'" Pet. Br. 41. But until the moment when class certification was denied, the *McCollins* case *was* a properly conducted class action. And although the case was "'stripped of its character as a class action' upon denial of certification," "'it does not follow that the case must be treated as if there never was an action brought on behalf of absent class members.'" *McDonald*, 432 U.S. at 393 (alteration omitted). Nothing in *Taylor* exempts class members from being bound to the adjudication of issues that were actually litigated and essential to the judgment that denied certification. And *Taylor* did not say that preclusion turns on whether a class was certified.

Nor *could* the Court have said that preclusion turns on certification. Rule 23's formal class-certification device originated in 1966, but class suits have a much longer pedigree, dating to "the earliest days of English law." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832 (1999). This Court's decisions recognized the binding effect of class judgments long before there was any such thing as class certification. As early as 1853, the Court recognized that an adequate representative of a class could "represent the entire body, and the decree binds all of them the same as if they were before the court." *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853). By the time the Court decided *Hansberry* v. *Lee* in 1940, it could cite a long line of cases standing for the proposition that "the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." 311 U.S. 32, 41 (1940) (citing *Smith*, 57 U.S. (16 How.) 288; *Royal Arcanum* v.

Green, 237 U.S. 531 (1915); *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co.* v. *Barber*, 245 U.S. 146 (1917); and *Ben-Hur*, 255 U.S. 356).

These cases refute any notion that class certification is indispensable to the binding effect of a class judgment. Cf. *Roper*, 445 U.S. at 326 n.3 (Stevens, J., concurring) ("since the concept of 'absent parties' was developed long before anyone conceived of certification orders," their status should not "depend on compliance with a procedural requirement that was first created in 1966"). To the contrary, adequate representation is and always has been the touchstone of preclusion in class suits. See Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1848, 1855 (1998) (the "two basic concepts" that historically justified the preclusive effect of class judgments were "identity of interest among the class members" and "adequate representation").

Petitioners also argue that notice is necessary to the binding effect of a class judgment. The Court in *Taylor* noted that due process may "sometimes" require notice of the original suit to the persons alleged to have been represented. 553 U.S. at 900. As explained below, see *infra*, Part IV, this is not one of those times. And apart from the requirements of due process, preclusion law itself does not require notice to bind a nonparty to the outcome of a representative suit. *E.g.*, *Restatement* § 41(2) ("A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process."); *Nevada* v. *United States*, 463 U.S. 110, 144 n.16 (1983) (a represented party is

"given adequate notice and a full and fair opportunity to be heard" through its representative).

Nor does preclusion in this context rest on the "virtual representation" theory *Taylor* disapproved. See *Bridgestone*, 333 F.3d at 769 ("Holding the absent class members to the outcome is no more an exercise in virtual representation than it is to hold them to a decision on the merits."). *Taylor* was not a class suit: The prior party there "ha[d] not purported to sue in a representative capacity." 553 U.S. at 905. *Taylor* thus poses no bar to precluding unnamed class members from relitigating class certification. To the contrary, petitioners' "theory that before certification class members cannot be thought to have been adequately represented" is "inconsistent with the Court's opinion in *Taylor* and the cases cited in it." *Thorogood*, 2010 WL 4286367, at *12.

For the same reasons, the ALI's view that precluding unnamed class members from relitigating class certification "would approach the kind of 'virtual representation' disallowed under current law" rests on a serious misinterpretation of *Taylor*. *Principles of the Law of Aggregate Litigation*, § 2.11, cmt. b (2010). Before *Taylor*, the ALI recognized that "[a] mere cosmetic change in the proposed class representative . . . should not defeat same-party status where the class for which certification is now being sought is the same as the one for which class certification was previously denied." ALI Tent. Dr. § 2.11, cmt. c. Nothing in *Taylor* is to the contrary.

IV. PETITIONERS DO NOT HAVE A DUE-PROCESS RIGHT TO RELITIGATE CLASS CERTIFICATION.

Finally, relying on *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), petitioners contend that they

were not subject to the *McCollins* court's jurisdiction because they did not receive notice and an opportunity to opt out. Petitioners' constitutional argument blends two strands of due-process doctrine: personal jurisdiction and procedural due process. These doctrines are distinct and should be analyzed separately. See *Adams* v. *Robertson*, 520 U.S. 83, 88–89 (1997) (per curiam). Neither is a barrier to precluding petitioners from relitigating class certification.

A. Petitioners' reliance on *Shutts* is misplaced. *Shutts* concerned only the requirements for a state court to exercise personal jurisdiction over nonresident unnamed class members who lack minimum contacts with the forum. See 472 U.S. at 806 (question presented was whether "Kansas ha[d] exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs," who had "no prelitigation contact" with the state). If the court whose judgment is to be accorded preclusive effect already has personal jurisdiction over the unnamed class members, "*Shutts* is inapposite." *SEC* v. *Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 292 (2d Cir. 1992).[9]

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[9] *See also Findley* v. *Falise (In re Joint E. & S. Dist. Asbestos Litig.)*, 78 F.3d 764, 778 (2d Cir. 1996) ("the *Shutts* holding as to what due process requires where a court lacks personal jurisdiction over some class members does not apply where the court has an independent basis for jurisdiction"); *Martin* v. *Drummond Co.*, 663 So. 2d 937, 941 (Ala. 1995) (*Shutts* "pertains when the plaintiff class members do not have such contacts with the forum state as would support an exercise of *in personam* jurisdiction over a defendant"); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1168 (1998) ("*Shutts* did *not* address the very different issue of

Here, there is no question that the district court had personal jurisdiction over petitioners. Unlike state courts, federal courts, as an arm of the federal sovereign, can assert nationwide jurisdiction over any resident of the United States. See *Miss. Publ'g Corp.* v. *Murphree*, 326 U.S. 438, 442 (1946); *Robertson* v. *R.R. Labor Bd.*, 268 U.S. 619, 622 (1925); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2113 (2008). And the relevant question in this multidistrict litigation is not whether a federal court in Minnesota can exercise personal jurisdiction over petitioners, but whether a federal court in West Virginia can. See, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) ("'[T]he transferee judge has all the jurisdiction . . . that the transferor judge would have had in the absence of transfer.'"). There is no doubt that a West Virginia court can exercise personal jurisdiction over West Virginia residents. Cf. *Burnham* v. *Superior Ct.*, 495 U.S. 604 (1990) (plurality opinion).

B. Even if *Shutts* were a procedural due process decision—and it is not—it would not support petitioners' argument that notice and the opportunity to opt out are required, as a matter of constitutional law, to bind unnamed class members to a judgment denying class certification. *Shutts* and the other cases on which petitioners rely concerned the requirements to bind absent parties to a judgment *on the merits of their claims*, not the very different question presented here of what due process requires to bind unnamed class members to a ruling on the procedural issue of

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whether the Due Process Clause guarantees to class members an independent substantive right to opt out.").

class certification, which does not dispose of anyone's claims on the merits.

Even as to judgments on the merits of unnamed class members' claims, moreover, this Court has not "laid to rest" that due process requires notice and an opportunity to opt out. Pet. Br. 35. Petitioners rely on *Richards* v. *Jefferson County*, 517 U.S. 793 (1996), and *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160 (1999). But neither case involved a class action—the parties to the prior actions "did not sue on behalf of a class," and "their pleadings did not purport to assert any claim against or on behalf of nonparties." *Richards*, 517 U.S. at 801; see also *S. Cent. Bell*, 526 U.S. at 167–68. The same is true of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which involved a judicial settlement of accounts in a common trust fund, not a class action. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 937 n.61 (1998) ("*Mullane* itself was not in form a class action."). And *Eisen* and *American Pipe* both concerned only Rule 23; neither decided any constitutional question.

This Court has never addressed the procedural due process requirements to bind unnamed class members to adjudications on the merits.[10] To the extent that the Court has broached the question, however, it has focused on adequate representation, not notice or a right to opt out. As the Court explained in *Hansberry*, "[i]t is familiar doctrine of

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[10] The Court has granted certiorari on the question twice in cases arising under Rule 23(b)(1) and (b)(2) and a similar state-court rule, but both times dismissed the writ as improvidently granted. *See Adams*, 520 U.S. 83; *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam).

the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present," and a court "is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." 311 U.S. at 42–43; see also *Ben-Hur*, 255 U.S. at 363; *Smith*, 57 U.S. (16 How.) at 303.

Following this Court's guidance, the drafters of Rule 23 proceeded on the assumption that notice and a right to opt out are not invariably required to bind unnamed class members. These rights are not provided in (b)(1) and (b)(2) class actions—even though there, unlike here, the judgment extinguishes the class members' claims on the merits. Lower courts have held that this presents no due-process problem. *E.g.*, *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364, 1373–74 (6th Cir. 1977); *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 254–57 (3d Cir. 1975).

Many distinguished scholars also believe that notice and an opportunity to opt out are not constitutionally mandated for merits adjudications, even in (b)(3) class actions, if the class members are adequately represented. *E.g.*, Shapiro, *supra*, at 958–59 ("[T]he constitutional propriety of class action treatment, and the binding effect of a judgment on the members of the class, turns on the issue of adequate representation."); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 621 (1987) ("as long as the plaintiff adequately represents the class," notice and opt-out rights "are no longer constitutionally compelled").

Thus, petitioners' suggestion that in the class-action context due process always requires notice and an opportunity to opt out is badly mistaken.

C. The Court should instead apply first principles of due process. "Because the requirements of due process are flexible and call for such procedural protections as the particular situation demands," the Court has "declined to establish rigid rules and instead ha[s] embraced a framework to evaluate the sufficiency of particular procedures." *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005) (internal quotation marks and alteration omitted).

Under that framework, the Court weighs (1) the nature and weight of the private interests affected; (2) the risk of an erroneous deprivation of those interests and the value, if any, of additional procedures; and (3) the governmental interest in avoiding the costs and burdens of additional procedures. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The balance here is not a close call: Society's interest in avoiding serial relitigation of class certification far outweighs any burden on petitioners' property interests.

1. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999). The answer here is no.

Petitioners do not argue that they have a protected property interest in the opportunity to seek class certification or in class certification itself. And for good reason: That "would be an entitlement to nothing but procedure," which "can[not] be the basis for a property interest." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 764 (2005); see also *id.* at

771–72 (Souter, J., concurring). Litigants "have no constitutionally recognized prelitigation entitlement or expectation" that particular procedures will be available to adjudicate their claims, as evidenced by the fact that changes in a jurisdiction's procedural rules, "unlike changes in the jurisdiction's liability rules, generally do not provoke retroactivity analysis when applied to litigants whose liability-related conduct took place under the old regime." Wolff, *supra*, at 2104. Petitioners have no protected property interest in invoking a procedural device for aggregating their claims. Cf. *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402 & n.8 (1980) (apart from the possible situation in which the entire class is an indispensable party, making class certification necessary to assert one's individual claim, a "'legally cognizable interest'" "rarely ever exists with respect to the class certification claim").

The only protected property interest petitioners can claim is in their causes of action themselves. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (recognizing that "a cause of action is a species of property" protected by the due-process clause). But petitioners' individual claims are untouched; they remain free to bring them at any time. "This fact clearly dilutes any conceivable negative impact" on petitioners' protected property interests. Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, [2002] 32 Envtl. L. Rep. (Envtl. Law Inst.) 10984, 10986 (Aug. 2002); see also Wolff, *supra*, at 2045 (denial of class certification merely "den[ies] one particular remedial avenue to the members of a class" and thus "entails a lesser alteration in legal position or status than does the final adjudication of the merits of an absentee's underlying claim"); cf. *Shady Grove*, 130 S. Ct. at

1443 (plurality opinion) (class certification "has no bearing" on substantive legal rights).

Petitioners assert that without an opportunity to seek class certification they will have "no effective means to seek redress for [their] damages" because their individual claims are too small to pursue outside of a class action. Pet. Br. 55. But petitioners cite no authority for the novel proposition that a claimant is deprived of his property interest in a claim simply because he chooses not to pursue it. Cf. *Lujan* v. *G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001) (hardships in collecting on a claim do not deprive a plaintiff of his property interest).

Moreover, denial of class certification does not leave petitioners without any meaningful avenue of redress. If petitioners' claims were meritorious, they could recover statutory damages of $200 per unlawful transaction,[11] attorney's fees,[12] and potentially punitive damages.[13] In such circumstances, courts have repeatedly recognized that individual claims are a viable alternative to class certification.[14] In addition, West Virginia has alternative aggregate-litigation procedures under which petitioners could seek to have their claims joined with those of other

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[11] W. Va. Code § 46A-6-106; *Credit Acceptance Corp.* v. *Long*, No. 2:10-cv-00003, 2010 WL 3809837, at *5–6 (S.D. W. Va. Sept. 22, 2010).

[12] W. Va. Code § 46A-5-104; *Hawkins* v. *Ford Motor Co.*, 566 S.E.2d 624, 632 & n.4 (W. Va. 2002).

[13] *See, e.g.*, *Muzelak* v. *King Chevrolet, Inc.*, 368 S.E.2d 710, 714–15 (W. Va. 1988).

[14] *See, e.g.*, *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996); *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996).

similarly situated plaintiffs in a single "mass litigation" proceeding, thereby reaping many of the same economies a class action provides.[15]

Any burden on petitioners' protected property interests is therefore slight, if it exists at all.

2. Nor would additional procedures reduce the risk of an erroneous deprivation of whatever protected interest petitioners might have in class certification. Whether viewed as the right to have notice and opt out of the first action or the right to relitigate the issue in a second action, the additional procedures petitioners seek would not increase the probability of an "accurate" decision. To the contrary, petitioners' proposed new due-process right to relitigate class certification would only increase the prospect of ultimately obtaining an anomalous result by "increas[ing] the number of throws of the litigation dice." *Thorogood*, 2010 WL 4286367, at *6–7; see also *Bridgestone*, 333 F.3d at 766–67. This would simply invite gamesmanship and inconsistent results. Once an adequate representative has fully and fairly litigated the issue, any marginal gains from additional procedures are negligible.

3. On the other side of the scales, the government's interests in avoiding the burdens of implementing additional procedures and in preventing serial relitigation of class certification are overwhelming. And if there were a due-process right to relitigate class certification, these burdens would fall on the states as well as the federal government.

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[15] *See* W. Va. Tr. Ct. R. 26.06 (procedures for referring cases to a "Mass Litigation Panel"); *id.* R. 26.04(a)(4) (economic-loss claims eligible for mass-litigation referral).

Under petitioners' proposal, notice would have to issue to the entire class for a decision denying certification to be binding. Publication of notice would delay proceedings for months and cost the putative class representative tens of thousands of dollars. Implementation of a system to track any opt-outs would cost the court and the parties significant additional time and money. And the process could well produce the "needless multiplicity of actions" that Rule 23 was "designed to avoid." *Parker*, 462 U.S. at 351.

Petitioners do not suggest that these procedures are desirable or workable. They simply assert, in the absence of these procedures, a new due-process right to relitigate class certification endlessly. Such a right would eviscerate the interests in finality underlying preclusion law. After each denial of class certification, nothing would prevent a new plaintiff from seeking certification of the same proposed class in successive courts—those courts would be constitutionally prohibited from giving preclusive effect to prior rulings denying class certification.

The government interest in precluding relitigation of class certification is high. "[D]uplication in the class action context can be exponentially more problematic than duplication in the event of parallel single party suits, because of the unique and heroic efforts invariably required to resolve such suits." Redish, *supra*, at 10985. Certification decisions dramatically change the stakes of litigation. Accordingly, if class counsel can obtain unlimited attempts at class certification by the simple expedient of changing the named plaintiff in the caption of the complaint, they can use class-action litigation "for *in terrorem* strategic effect":

> Where a federal court has refused to certify a class action, permitting another court, state or federal, subsequently to certify essentially the same class under the same governing substantive and procedural standards effectively enables plaintiffs' lawyers to use the class action device as a means of legalized blackmail. A defendant is aware that its success in opposing class certification in 1, 2, or even 50 different courts would not preclude a 51st court from granting certification. The defendant thus must face the possibility of a constant stream of harassing filings. Hence, defendants are effectively forced to 'buy' litigation peace, even where such payments are wholly undeserved, by settling.

Id.

Society undoubtedly has a compelling interest in preventing this type of "asymmetric system in which class counsel can win but never lose." *Bridgestone*, 333 F.3d at 767. And the interest is not just in protecting defendants from litigation harassment. Another frequently noted form of class-action abuse occurs when defendants collude with class counsel to settle the case at a bargain-basement price, with generous fees for class counsel, at the expense of the class members. See, *e.g.*, Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1660–68 (2008). In this situation, both the defendant and class counsel have an incentive to search for the "anomalous court" that will certify a class action, see *id.* at 1664, and it may well be unnamed class members themselves who wish to seek an injunction to halt the state-court litigation, see Wolff, *supra*, at 2073.

The government has an acute interest in preventing these sorts of abuses of the class-action device. That interest weighs dispositively in the due-process balance. And holding that petitioners have a constitutional right to relitigate class certification would not only prevent the sort of injunctive relief at issue here, but also would foreclose a legislative solution to these very serious problems. That is the only result that would be "draconian." Pet. Br. 50.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,

Petitioners,

v.

BAYER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circu.t

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INTRODUCTION

In its brief, Bayer argues that a judgment in a case where a federal court *denied* class certification binds the putative class, both as to whether a class may be certified in another case under different procedural rules and as to a critical aspect of the *merits*—the elements required to state a claim. Bayer posits that the federal court's explanation of why the case was not an appropriate one in which to issue a judgment binding a class was itself a binding determination on the merits of the never-certified class's claims. That through-the-looking-glass proposition cannot be correct.

Bayer's position contradicts governing principles of preclusion law. Bayer's argument fails not only because petitioners were not parties to the final judgment in the prior case, but also because whether West Virginia procedural law allows class certification was not at issue, much less decided, in that case. And Bayer brushes aside this Court's insistence that parties cannot be bound by a judgment unless they have been afforded minimum requisites of due process, including notice, an opportunity to be heard, and the option to be excluded from a damages class action.

Ultimately, Bayer falls back on policy arguments against repetitive litigation that this Court has consistently *rejected* as reasons to bind nonparties to judgments procured in their absence. Bayer's policy arguments ring especially hollow because, in the Class Action Fairness Act, Congress addressed Bayer's concerns in a very different way.

Bayer's insistence that petitioners, who never had a day in court, must "take the bitter with the sweet"

is exactly backwards. *Bayer* successfully argued against certification in the previous case and forestalled any classwide judgment. The consequence of Bayer's strategy was a judgment that binds only the individual plaintiff in the earlier case, not the proposed class members whom Bayer persuaded the court to leave out of that case.

ARGUMENT

I. Bayer's Argument Ignores Fundamental Principles of Preclusion Law.

A. Bayer Disregards *Semtek*'s Adoption of State Preclusion Principles.

Bayer acknowledges that under *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), federal courts generally borrow state preclusion law to determine the effect of judgments in diversity cases. *See* Resp. Br. 18. But Bayer's brief makes no attempt to find support in West Virginia's—or any state's—preclusion law. Instead, urging this Court to craft a federal preclusion rule for class certification rulings, Bayer relies on policy arguments and federal decisions—in particular, *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), and *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842 (7th Cir. 2010), whose reasoning has been described as "adventurous, to say the least." Stephen Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1725 n.212 (2004).[1]

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[1] *See also* Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice & Procedure* § 4455 (2d ed. 2010).

Citing a law review article predating *Semtek* by 15 years, Bayer says "the preclusive effect of a federal procedural ruling should be governed by a uniform federal rule of decision." Resp. Br. 18. *Semtek* itself concerned a federal procedural ruling—a federal judge's designation of an involuntary dismissal as "on the merits" under Federal Rule of Civil Procedure 41(b). *See* 531 U.S. at 499, 501-06. The Court rejected a uniform federal preclusion rule, holding that although federal common law determined the preclusive effect of the procedural ruling, state law would be "adopt[ed], as the federally prescribed rule of decision." *Id.* at 508.

It may be, as Bayer argues, that a different rule applies to a merits judgment in a certified federal class action because Rule 23 "'clearly contemplates a uniform federal rule on who is bound by [a class-action] suit.'" Resp. Br. 18 (quoting Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 763 (1976)). In *Semtek*'s terms, it may be "incompatible with federal interests," 531 U.S. at 509, not to hold class members bound by a class judgment, assuming they were afforded due process.

Here, however, the judgment was *not* rendered in a class action, but in a lawsuit the district court did *not* permit to be maintained as a class action. *In re Baycol Prods. Litig.*, 265 F.R.D. 453 (D. Minn. 2008) ("*McCollins*"). The judgment did not comply with Rule 23(c)(3)'s directive that a class-action judgment "include and describe those whom the court finds to be class members" subject to it. The judgment was nothing more than the dismissal of an individual action brought by George McCollins. Under *Semtek*,

state-law principles govern the preclusive effect of such dismissals.

B. *McCollins* Did Not Involve the Same Issue Presented by Petitioners' Case.

Bayer insists that the procedural issue *McCollins* decided—whether *Federal* Rule of Civil Procedure 23 permitted class certification—was the same as the issue in petitioners' action in West Virginia—whether *West Virginia* Rule of Civil Procedure 23 permits certification. Bayer asserts that because the words of the two rules are similar, the question of certification under one is the same as under the other, and any differences in application of the two rules reflect different exercises of discretion under the same standard.

West Virginia's rules are not the same as the federal rules, despite their similar words. Even state and federal rules using "identical language" are legally distinct, with the meaning of state rules determined by state courts—a "proposition ... fundamental to our system of federalism, [and] applicable to procedural as well as substantive rules." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). The West Virginia Supreme Court has emphasized that its "legal analysis" of West Virginia's Rule 23 does not follow that of the federal courts. *See In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 61 (W. Va. 2003). Different outcomes regarding class certification under these federal and state rules thus do not reflect varying exercises of discretion under the same rule, but exercises of discretion under *different legal standards*.

McCollins' denial of class certification rested on the court's view that, under Federal Rule 23(b)(3), common issues did not "predominate" over individual issues concerning causation of injury. 269 F.R.D. at

457-58. In *Rezulin*, the West Virginia Supreme Court stated that under *West Virginia* Rule 23(b)(3), "[c]hallenges based on ... causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." 585 S.E.2d at 72 (citation omitted). That court repeatedly rejected the argument that individual causation issues prevented certification of a damages class under West Virginia law. *See id.* at 72, 74.

Rezulin underscores that class certification under West Virginia's rule presents a different legal issue from that decided in *McCollins*: It is governed by different standards under which different facts are determinative. Whether West Virginia procedural law permits a Baycol economic-damages class action "has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception [to the Anti-Injunction Act]." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149 (1988).

The denial of class certification was also not essential to the final judgment in *McCollins*. That judgment rested on the district court's holding that the *individual plaintiff* had not made out a claim, which would have led to the same outcome regardless of whether a ruling on certification preceded it. Bayer contends (at 24 n.1) that petitioners waived the argument that the certification ruling was not essential, but petitioners argued below that the certification ruling lacks issue-preclusive effect under West Virginia law, and need not have made every argument that might support that position. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). Bayer further

argues (at 24) that procedural rulings often have issue-preclusive effect, but the cited examples concern *dismissals for procedural reasons*, where the procedural rulings were essential to the judgments.

Bayer further maintains that even if class certification under state rules is a different issue from certification under federal rules, the certification denial in *McCollins* decided a *substantive* issue common to both cases—namely, that the claims asserted require individualized causation and bodily injury. Bayer's argument contradicts its repeated assertion that petitioners' *individual* actions are not precluded by the federal judgment. If petitioners were bound by the federal court's resolution of this issue of *substantive* West Virginia law, they would be bound whether in a class action or in individual actions.

In any event, Bayer's argument is unavailing for four reasons. First, as petitioners' opening brief explains (at 27-29), procedural rulings on class certification, although informed by considerations of substantive law, are not supposed to resolve the merits of substantive claims. Second, as *Rezulin* states, individual questions of causation and injury do not, under West Virginia law, preclude class certification, so *McCollins*' substantive rulings would not be dispositive of *class certification* under West Virginia law in any event and thus do not support the injunction at issue. Third, petitioners' complaint asserts a substantive claim not asserted in *McCollins*—common-law fraud—and no issues about the merits of that claim or its eligibility for class certification were litigated and decided in *McCollins*, as would be necessary for issue

preclusion regarding that claim. *See State v. Miller*, 459 S.E.2d 114, 120 (W. Va. 1995).[2]

Fourth, the contention that a ruling denying class certification is a binding determination regarding the substantive claims of absent class members is self-contradictory. Denying class certification means that the court has concluded that a merits judgment binding the class would be inappropriate under applicable procedural rules. The suggestion that, in explaining why it would *not* issue a merits judgment binding on the class, the district court actually issued such a judgment cannot be correct.

C. The Recent Decision in *White* Does Not Dispose of This Case.

Bayer claims that *White v. Wyeth*, 2010 WL 5140048 (W. Va. Dec. 17, 2010), demonstrates that class certification under West Virginia law presents the same issue as the federal-law certification issue decided in *McCollins*. Resp. Supp. Br. 3. But nothing in *White* undermines the West Virginia Supreme Court's earlier holdings in *Rezulin* that West Virginia certification standards do not follow the federal rules and that, under West Virginia law, individual questions of causation and injury do not bar certification. *White* says nothing about class certification because no class was certified in *White*, and class certification

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[2] Bayer claims petitioners somehow waived reliance on the common-law fraud claim, but the Eighth Circuit itself recognized that petitioners asserted a fraud claim and considered its impact on preclusion. Pet. App. 10a n.5. The court's assertion that the fraud claim is merely the same right of action framed in terms of a new legal theory is unfounded.

was not the question addressed in *White*. *See* 2010 WL 5140048 at n.4.

White decided issues concerning requirements for stating a claim under West Virginia's Consumer Credit and Protection Act (CCPA). The court held that such claims require the plaintiff to allege some loss (not necessarily physical injury) caused by the defendant's unlawful conduct, and that reliance is *not* necessary to establish causation in cases involving omission or concealment. The court further held that consumers of prescription drugs are categorically ineligible to bring claims under the CCPA.

These merits holdings are quite *unlike* the view of the statute taken by the federal court in *McCollins*. Far from suggesting the appropriateness of preclusion, *White* underscores the incongruity of binding absent class members who had no opportunity to participate or appeal in *McCollins* to the federal court's views of the *merits* of their CCPA claims by ascribing preclusive effect to its class certification ruling.[3]

Moreover, *White* does not detract from the importance of addressing the preclusion issue here. *White*'s holding that prescription drug consumers cannot sue under the CCPA neither affects petitioners' fraud and warranty claims nor suggests that individual issues of causation or loss associated with those claims would

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[3] *White*'s holding that drug purchasers cannot pursue CCPA claims also contradicts Bayer's view that individual issues predominate under the CCPA, because that holding is equally applicable to all class members Ironically, Bayer could benefit from class treatment of CCPA claims under *White*, if that holding withstands rehearing, because a class action could yield a class-wide merits dismissal of those claims

bar class certification under West Virginia law. Although *White* would bar the class's CCPA claims, the plaintiffs in *White* intend to seek rehearing of the court's unanticipated ruling that prescription drug consumers are outside the law's protection, and it remains possible that class members will have viable CCPA claims. In any event, whatever the ultimate outcome in *White*, the injunction here precludes petitioners from litigating whether West Virginia law permits certification of a class to pursue their claims—an issue never decided by any court. Deciding the propriety of such an injunction is important regardless of whether the class ultimately has viable CCPA claims.

D. Absent Class Members Were Not Parties to the *McCollins* Judgment.

Bayer's insistence that absent class members were parties to the *McCollins* judgment is untenable. As the leading civil procedure treatise explains, the very point of class certification is to determine whether class members will be bound by the judgment. *See* Wright *et al.*, *Federal Practice & Procedure* § 4455. A ruling that an action may not be maintained as a class action is a decision that the absent class members are not parties bound by the resolution of the case. The judgment in *McCollins*, in other words, was not a judgment in a class action and binds only George McCollins and anyone in privity with him.

Bayer acknowledges that *Taylor v. Sturgell*, 553 U.S. 880 (2008), holds that nonparties may not be bound to a judgment merely because the party who obtained it is said, after the fact, to have adequately represented their interests. Rejecting the contrary conclusion of the American Law Institute as errone-

ous, Bayer insists that *Taylor* is inapplicable here merely because Mr. McCollins *sought* to maintain a class action.

McCollins, however, was never *permitted* to pursue his case as a class action. He differed from Herrick, the prior litigant in *Taylor v. Sturgell*, only in that he *said* he wanted to represent a class. But saying it did not make it so. From the standpoint of absent class members, he was as much a stranger as Herrick was to Taylor. Only the certification of a class, with the safeguards of notice and opportunity to be heard or opt out, establishes a judicially created relationship between the representative and the class, without which there can be no basis for preclusion. *See infra* at 13-19.

Bayer argues that a putative class action *is* a class action until a court says it is not. Rule 23, however, says that an action may be maintained as a class action only *if* the court finds the Rule's criteria are satisfied, not that it may be maintained as a class action *until* the court finds the Rule is *not* satisfied. *See* Fed. R. Civ. 23(a) & (b). No court found that McCollins could represent a class, and thus at no time did he do so.

Citing *Devlin v. Scardelletti*, 536 U.S. 1 (2002), and *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), Bayer contends that absent class members may be treated as "parties" under some circumstances. In fact, both cases indicate that members of a class denied certification are not parties to a judgment obtained by the plaintiff in his individual capacity. *Devlin*'s holding that members of a *certified* class, who are subject to a judgment expressly intended to bind them to a settlement to which they objected, are "par-

ties" for appellate purposes in no way suggests that members of a proposed class that was *denied* certification are parties to a judgment against the individual plaintiff. As Justice Scalia observed (without contradiction from the majority) in dissent in *Devlin*, "[n]ot even petitioner, however, is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*"—let alone after certification is denied. 536 U.S. at 16 n.1. Bayer advances exactly that erroneous argument.

American Pipe similarly undermines Bayer's argument. *American Pipe* holds that, for policy reasons, federal statutes of limitations are tolled for absent class members when a putative class action is filed. 414 U.S. at 550-52. The opinion emphasizes that until class certification, would-be class members are merely "passive beneficiaries" of the action's filing and need take no notice of its existence. *Id.* at 552. Moreover, tolling ends when certification is denied because absent class members can no longer benefit from the judgment. *See id.* at 561. *American Pipe* thus contradicts Bayer's theory that a judgment obtained in an action after class certification has been denied has preclusive effect upon the class.

Bayer acknowledges (at 33) that absent class members have been permitted to seek review of orders denying class certification only by intervening. In a footnote (n.6), Bayer says courts (including this one) that allowed or required intervention for that purpose need not have done so because intervention is not necessary to appeal a binding judgment. Bayer's argument simply assumes the conclusion that the judgment would be binding on class members if they

did not intervene. Moreover, Bayer cites *no* decision allowing such an appeal without intervention. Its inability to do so reflects the courts' shared understanding that, absent intervention, class members are not parties to a judgment in an individual action where class certification was denied.

Bayer also observes that class actions predated Rule 23 and its certification mechanism. Because judgments in those actions bound nonparties without certification, Bayer argues, an uncertified class action under Rule 23 must also be a representative action for preclusion purposes.

Bayer overlooks that even before Rule 23, it took more than a plaintiff's assertion that he represented a class to make a judgment binding on absent class members. Before Rule 23 was promulgated, and until it was substantially amended in 1966, an action involving rights that were not common or jointly held, but that only presented common questions of fact or law, was considered a "spurious" class action, and the judgment bound only named parties or intervenors, *not* absent class members. *See* Fed. R. Civ. P. 23, Advisory Comm. Note to 1966 Amendment; *Am. Pipe*, 414 U.S. at 545-46. Class actions based on commonality of issues among individual damages claims did not truly exist under federal procedural rules except as an "invitation to joinder," *id.* at 546, until modern Rule 23(b)(3) classes were invented in 1966. Thus, before Rule 23 assumed its current form, a purported class representative such as McCollins could not have brought a damages action that would bind absent class members, with or without certification.

Moreover, the possibility that, before Rule 23 existed, a final judgment on the merits in the small

category of cases recognized as proper class actions would bind absent class members hardly suggests that a ruling denying class certification—which as Bayer itself stresses did not even exist before Rule 23—binds absent members of a never-certified class. Practice before Rule 23 was promulgated cannot determine the preclusive effects of procedural rulings for which there was then no analog.

In any event, Bayer does not contest that Rule 23 is currently the sole mechanism for maintaining a federal-court class action. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437-42 (2010). An action not certified under Rule 23 cannot be maintained as a class action, whatever the plaintiff in the case may desire, and absent members of a might-have-been class are not bound by the resolution of a case that was not certified.

II. Binding Absent Class Members to the *McCollins* Judgment Would Deny Them Due Process.

As *Taylor* and *Richards v. Jefferson County*, 517 U.S. 793 (1996), make clear, the rule that judgments bind only parties reflects demands of due process that are not satisfied by a post hoc determination that a litigant adequately represented a later plaintiff's interests. A "properly conducted class action[]" has preclusive effect, *Taylor*, 553 U.S. at 894, because such an action provides protections for absent class members satisfying minimum due-process requirements. *See id.* at 901; *Richards*, 517 U.S. at 801-02. Those requirements, in actions involving substantial individual damages claims, include notice and the rights to be heard and opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The

petitioners undisputedly received none of these protections.

With barely a citation to the Court's opinion, Bayer (at 40) asserts that *Shutts* is not a "procedural due process decision" and that petitioners confuse personal jurisdiction with procedural due process. *Shutts*, however, explains that personal jurisdiction is, fundamentally, a matter of due process. *See* 472 U.S. at 806-08 (discussing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Further, *Shutts* holds that, "to bind an absent plaintiff concerning a claim for money damages or similar relief," a court must "provide minimal procedural due process," including "notice plus an opportunity to be heard and participate in the litigation," and that notice must satisfy the requirements prescribed in the seminal due-process decision *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). *Shutts*, 472 U.S. at 811-12. Additionally, the Court held that "at a minimum," due process requires "that an absent plaintiff be provided an opportunity to remove himself from the class." *Id.* at 812.

Bayer maintains that these due-process requirements apply only if absent class members lack minimum contacts with the forum state, which Bayer says is not the case here.[4] To be sure, *Shutts* held that a

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[4] Bayer's premise is that West Virginia class members had forum contacts because the Minnesota federal court that rendered the judgment, as an MDL transferee court, had the same personal jurisdiction as a West Virginia federal court. That premise is, at best, a fiction. At least one court of appeals has held that even if *Shutts*'s protections are limited to class members who lack minimum forum contacts, those protections must be offered by an MDL court that purports to enjoin an action by

(*Footnote continued*)

court *may* exercise personal jurisdiction over absent class members who *lack* forum contacts if it provides them "minimal procedural due process protection." 472 U.S. at 811-12. That holding hardly implies that a court may dispense with minimal due-process protections if a class member *has* forum contacts. After all, minimum contacts with the forum generally permit a court to exercise personal jurisdiction only by providing notice of an action through means comporting with due process. *See, e.g., Mullane*, 339 U.S. at 313-15. In a class action, the coincidence that the action is pending in a state where a class member has minimum contacts cannot justify binding her to the outcome without notice and the opportunity to be heard or opt out when another class member lacking forum contacts would have those due-process entitlements.

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class members who lack contacts with the state where the MDL court sits. *See In re GM Corp Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 141 (3d Cir. 1998)

Bayer also states that the due process clause does not limit the territorial jurisdiction of federal courts as it does state courts, and that Congress can therefore authorize national service of federal-court process regardless of a party's forum contacts. This Court has reserved opinion on whether due process limits the territorial scope of jurisdiction that Congress may authorize. *See Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 n.* (1987). It remains unclear whether due process constrains the geographic extent of federal-court personal jurisdiction, particularly in diversity cases. *See* Robert Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 Vill. L. Rev. 1 (1988). Here, the point is irrelevant because Congress has not authorized nationwide service of process in diversity cases. Moreover, even if Congress could dispense with forum contacts in federal diversity cases, it could not eliminate the requirements of notice and opportunity to be heard that lie at the heart of *Shutts*.

Thus, read sensibly, *Shutts* means that what determines whether a court may exercise personal jurisdiction over absent members of a personal-damages class is the same regardless of where they reside: It must provide them with due process. *See* Brian Wolfman & Alan Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 U.M.K.C. L. Rev. 730, 733 (2006).[b]

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), confirms that *Shutts* is not limited to concerns about territorial limits of personal jurisdiction. *Ortiz* explains that opt-out rights stem from "our deep-rooted historic tradition that everyone should have his own day in court," and that "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class" where "[t]he legal rights of absent class members ... are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." *Id.* at 846-47. Although *Ortiz* neither addresses personal jurisdiction nor mentions "minimum contacts," it states that "we raised the flag on *this issue of due process* more than a decade ago in" *Shutts*. *Id.* at 847 (emphasis added).

That due process directs *Shutts*'s holding cannot seriously be disputed. Thus, Bayer (at 41-42) claims that, even if *Shutts* is about due process, it addresses

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[b] Even Bayer's sources agree that *Shutts* "is, in fact, about more than just personal jurisdiction" and that attempts to limit it to that issue are "ultimately unsustainable." Tobias Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2080 (2008).

only the requirements for binding absent parties to a judgment on the merits, not "a ruling on the procedural issue of class certification, which does not dispose of anyone's claims on the merits." *Shutts* does not draw that distinction. It states requirements for "bind[ing] an absent plaintiff concerning a claim for money damages," 472 U.S. at 811, and *McCollins* certainly concerned a claim for money damages. Moreover, Bayer's distinction is illusory here because the lower courts held that *McCollins* binds the class with respect to the merits of their state-law claims. As the Eighth Circuit stated, "to reach the question of class certification, the district court ... decided a substantive issue of West Virginia law as to what a former Baycol user suing Bayer must prove under the WVCCPA." Pet. App. 7a. The Eighth Circuit upheld the injunction because it found that "[c]ertification under the state rule would undermine this conclusion of *substantive state law* properly made by the district court." *Id.* 8a (emphasis added). It is that holding of substantive state law that Bayer contends is binding on the class. Thus, Bayer's procedure-merits distinction—even if it were supported by *Shutts*—does not support the result Bayer seeks.

Bayer, therefore, must argue (at 42) that due process does not require notice and opt-out rights even to bind the class on the merits if the class was adequately represented in *McCollins*. Leaving aside the dubiousness of a post hoc determination that representation was adequate, *Shutts* addresses this point directly:

> The plaintiff *must* receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The

> notice *must* be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

472 U.S. at 812 (emphasis added) (quoting *Mullane* and citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974)). Bayer chides petitioners for relying on *Mullane* and *Eisen*, noting that *Mullane* was not a class action and that *Eisen* addressed Rule 23. But *Shutts* was a class action, and it cited *Mullane* and *Eisen* to support its holding that notice and an opportunity to be heard are due-process protections required to bind absentees. Moreover, although *Eisen* addresses Rule 23, the decision indicates that Rule 23 incorporates *Mullane*'s due-process standard. *Eisen*, 417 U.S. at 173-75 (discussing *Mullane* and quoting Advisory Comm. Note to Amendments to Rule 23, stating that mandatory notice is "designed to fulfill requirements of due process to which the class action procedure is of course subject").

Bayer also posits that because due process does not require individual notice and opt-out rights for Rule 23(b)(1) and (b)(2) class actions, due process must not require notice and opt-out rights in *any* class action. But the rationale for dispensing with notice and opt-out rights in (b)(1) and (b)(2) class actions is that judgments on the types of claims falling within those subdivisions necessarily affect the rights of absent persons even if the claims are pursued individually. That rationale does not apply to damages claims like those at issue here. Thus, the same courts whose decisions Bayer cites (at 43) for the proposition that notice and opt-out rights are not required in (b)(1)

and (b)(2) cases also hold that those procedures *are* required in (b)(3) cases. *See In re Diet Drugs*, 282 F.3d 220, 230 (3d Cir. 2002); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000). More importantly, Bayer's position contradicts both *Shutts* and *Ortiz*, which state that notice and opt-out rights are constitutional prerequisites to binding non-parties to a class action "wholly or predominately for money damages." *Ortiz*, 527 U.S. at 848 n.24 (quoting *Shutts*, 472 U.S. at 811 n.3).[6]

III. Bayer's Policy Arguments Are Unavailing.

Bayer's argument reduces to a plea that the Court create a special rule governing the preclusive effect of class-certification denials to ward off the specter of repeated attempts to certify classes that a federal court has declined to certify under Rule 23. This Court, however, has not allowed concerns about repetitive, "vexatious" litigation to "justifly] departure from the usual rules governing nonparty preclusion."

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[6] Citing two law review articles, Bayer says some scholars believe notice and opt-out rights are not required to bind absent class members in (b)(3)-type class actions. The first, however, *agrees* with petitioners that *Shutts* requires these protections; the author just disagrees with *Shutts*. *See* David Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev 913, 954 (1998). The second article also agrees with petitioners' reading of *Shutts*. The excerpt Bayer quotes—"'as long as the plaintiff adequately represents the class,' notice and opt-out rights 'are no longer constitutionally compelled,'" Resp. Br. 43—misrepresents the author's view. The author is discussing what she refers to as "purely representational actions." Diane Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 621 (1987). That category, she explains, includes mostly (b)(1) and (b)(2) cases, not (b)(3) cases, which would typically be what she calls "quasi-representational." *Id* at 600; *see id.* at 604-05.

Taylor, 553 U.S. at 903; *see Richards*, 517 U.S. at 804-05.

Bayer also ignores that Congress has adopted a *different* policy to counter perceived "abuses" that may be implicated when litigants attempt to maintain a class action under state procedural rules after a federal court denies certification of a parallel class. In the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA"), Congress addressed such concerns not by prescribing enhanced preclusive effect for federal certification rulings, but by adopting new jurisdictional provisions effectively subjecting most large class actions to federal certification standards.

CAFA amended 28 U.S.C. § 1332 to provide federal jurisdiction over class actions involving minimal diversity of citizenship if the class has at least 100 members and the aggregate amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2), (5) & (6). CAFA also liberalized removal jurisdiction over such actions. *See* 28 U.S.C. § 1453(b). Thus, CAFA gives each defendant in a class action meeting its jurisdictional requirements the option to choose a federal forum, except where local interests predominate. *See* 28 U.S.C. §§ 1332(d)(3) & (4).

One of the reasons for these provisions was to allow application of federal procedural standards to class actions meeting CAFA's jurisdictional criteria. CAFA's backers asserted that state courts were too "permissive" in interpreting their rules to allow class actions where federal standards would not. The Senate Report noted that "[s]ome state courts with this permissive attitude have even certified classes that federal courts had already found uncertifiable." S. Rep. No. 109-14, at 22 (Feb. 28, 2005). CAFA's

solution was to channel class actions into federal courts, where federal rules would govern certification. *See id.* at 6-7, 54; *see also Shady Grove*, 130 S. Ct. at 1437-38. Class actions filed in or removed to federal court under CAFA will also potentially be subject to multi-district litigation procedures, meaning that, in cases arising out of common facts, federal class-certification standards often will be applied by the same judge.

Thus, Congress has already addressed the perceived problem that concerns Bayer:

> [CAFA] will functionally prevent many state certifications where the action is deemed sufficiently "interstate" by expanding the federal courts' minimal diversity and removal jurisdiction. Hence, Congress, in effect, produced largely the same result as the court in *Bridgestone/Firestone II*. The difference is that the result of CAFA is most likely within congressional power, whereas the Seventh Circuit's decision was not within the federal courts' power.

Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 Hamline L. Rev. 218, 235 (2006).

Importantly, CAFA limits federalization of class actions by permitting some class actions to proceed in state courts: cases of primarily single-state concern, *see* 28 U.S.C. §§ 1332(d)(3)-(4); cases not meeting CAFA's size, amount-in-controversy, and diversity requirements, *see id.* at 1332(d)(2), (5) & (6); and cases filed before CAFA's effective date, *see* Pub. L. No. 109-2, § 9. Given Congress's choice about how to address the issue of application of differing state and

federal procedural standards to class actions, and the limits on the solution Congress selected, the courts should not attempt to address the same concerns on an ad hoc basis by expanding preclusion beyond its traditional reach (and the limits due process has long been thought to impose on it).[7]

CAFA aside, Bayer's fears are overstated. This case threatens no truly repetitive litigation: Whether a class may be certified under West Virginia law *has never been litigated*. And although absent members of the class petitioners seek to represent will not be *precluded* if the state courts deny certification of petitioners' action, the stare decisis effect of such a determination within the West Virginia court system would protect Bayer from infinite repeat attempts. *See Taylor*, 553 U.S. at 903-04. The absence of a problem of sufficient scope to justify the distortion of preclusion principles Bayer seeks is demonstrated by the small number of cases in which the preclusive effect of a federal court's denial of class certification has been litigated—a number that is unlikely to multiply significantly in light of CAFA.

Bayer's contention that its interest in avoiding litigation outweighs the interest of class members in what it calls a purely procedural question gives far too little weight to the importance of the class action device in facilitating the vindication of substantive claims. It also ignores that Bayer seeks to preclude the class on the substantive issue of the elements of a

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[7] Federal judicial rulemakers also "considered and abandoned proposals to preclude the certification of a class ... after negative decisions on those questions by a federal court." Burbank, *supra*, 79 Notre Dame L. Rev. at 1697 n.85

claim for relief, as well as on class certification. Bayer's policy arguments cannot overcome the due-process protections to which class members are entitled or the countervailing policy, expressed in the Anti-Injunction Act, against any interference with state-court proceedings that is not genuinely necessary to protect a federal judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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IN THE
Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to this Court's Rule 25.6, respondent Bayer Corporation submits this supplemental brief to bring to the Court's attention a recent decision of the Supreme Court of Appeals of West Virginia that has dramatically shifted the grounds upon which the petition for writ of certiorari rested and upon which petitioners' claims are based. See *White* v. *Wyeth*, No. 35296, 2010 WL 5140048 (W. Va. Dec. 17, 2010) (attached as a Supplemental Appendix to this brief).

On December 17, 2010, the state supreme court ruled that a private cause of action under the West Virginia Consumer Credit and Protection Act (WVCCPA), W. Va. Code § 46A-6-106(a), requires, *inter alia*, "proof of a causal connection between the alleged unlawful conduct and the consumer's ascertainable loss." Supp. App. 22. In the context of prescription-drug purchases, the court was "simply not convinced that [the necessary] causal connection exists," and, as a result, held that "the private cause of action afforded consumers under [the WVCCPA] does not extend to [such] purchases." *Id.* at 22, 24. That decision has significant implications for this case.

I. *WHITE* EFFECTIVELY DISPOSES OF THE UNDERLYING CLAIMS PETITIONERS SEEK TO LITIGATE AS A CLASS.

White grew out of facts (and claims) similar to those at issue here. In 2004, the *White* plaintiffs brought a putative class action against prescription-drug manufacturers pursuant to the WVCCPA, alleging that defendants had used unfair and deceptive practices in promoting hormone replacement therapy drugs to doctors and patients. Supp. App. 6–7. Following class-certification discovery, defendants

disputed that plaintiffs had a viable claim because they could not causally connect their individual claims of injury to any fraudulent conduct attributable to Wyeth. *Id.* at 7. Plaintiffs countered that they had no obligation to do so under the statute; it was enough to show that "Wyeth engaged in deceptive practices and that [plaintiffs] were harmed." *Id.*; see also *id.* at 9-10 ("'Plaintiffs[ ] advance the argument that when the Plaintiffs received drugs that were different from or inferior to that which they were entitled to receive, they did not receive the benefit of their bargain, and they therefore suffered an ascertainable loss and had a right to bring an action under the WVCCPA.'").

On a certified question from the Circuit Court of Putnam County, the West Virginia Supreme Court disagreed. After canvassing the statute's text, history, and purposes, the court held that to state a cause of action under the WVCCPA, a plaintiff must show (1) unlawful conduct by a seller, (2) an ascertainable loss on the part of the consumer, and (3) a causal connection between the alleged unlawful conduct and the consumer's ascertainable loss. Supp. App. 22.

The court, however, did not stop there. Applying that standard to prescription-drug purchases—the basis for plaintiffs' claims—the court found that the requisite causal connection did not exist as a matter of law because of the intervening role of a physician in the decisionmaking process. Supp. App. 22-23. Thus, because "[p]rescription drug cases are not the type of private causes of action contemplated under the . . . WVCCPA," *id.* at 22, the court concluded that the statute does not extend to consumers claiming losses based upon such purchases, *id.* at 23–24.

The economic-loss claims petitioners seek to litigate as a class collide head-on with *White*. In petitioners' own words, they hope to proceed as a class "with respect to their consumer protection act claims." JA 184. But that is precisely what *White* has foreclosed. With no viable cause of action under the WVCCPA, the crux of petitioners' class-based economic-loss claims has been eliminated. A trip back to the West Virginia courts for consideration of certification of those claims, therefore, would be futile.

It is difficult to understand why this Court would want to expend its scarce resources resolving the complicated legal issues presented by petitioners when the ultimate consequence of a ruling in their favor by this Court would be dismissal of their claims in state court. Under these circumstances, the Court may wish to consider whether the writ was improvidently granted.

II. *WHITE* ALSO DEMONSTRATES THAT PETITIONERS' ARGUMENTS AGAINST ISSUE PRECLUSION ARE WRONG AND ARE NOT WELL PRESENTED.

In addition to the pragmatic considerations described above, *White* undercuts petitioners' claim that their case presents a different issue from that litigated in *McCollins*—one of the key issues upon which they sought and were granted certiorari.

A. As Bayer explained, petitioners' motion for class certification in *Smith* seeks to relitigate the same substantive rulings of West Virginia law that underlie the denial of class certification in *McCollins*. Resp. Br. 19–22. Specifically, petitioners dispute the *McCollins* court's ruling that each class member would have to present individual evidence of an

injury caused by Baycol to establish liability under the WVCCPA. See Pet. App. 10a.

While petitioners' belief that the *McCollins* court got it wrong is irrelevant to issue preclusion, Resp. Br. 21, *White* clarifies that the WVCCPA claims petitioners seek to certify do require proof of an injury caused by the defendant's allegedly fraudulent conduct. Contrast, *e.g.*, JA 186, 207. Indeed, *White* goes beyond *McCollins* to hold that the WVCCPA provides no cause of action for private citizens who, like petitioners, claim economic loss due to the purchase of prescription drugs.

B. Apart from the substantive issue petitioners seek to relitigate, *White* also undercuts the critical proposition on which petitioners have staked their case and their petition here: that a different class-certification issue is presented in *Smith* simply because a West Virginia court might exercise its discretion differently and certify their proposed class under West Virginia Rule 23. See Pet. Br. 19–29. Although petitioners' contention lacks merit for the reasons set forth in Bayer's brief, see Resp. Br. 22–28, that contention is no longer presented here because no amount of discretion will lead a West Virginia court to certify a class under the WVCCPA where the claim is explicitly foreclosed by a recent decision of West Virginia's highest court.

Petitioners cannot salvage their position by belatedly arguing that the injunction should be vacated so they can pursue certification of their common-law fraud and warranty claims. Petitioners never developed these claims in their motion for certification in state court, and they have ignored them in their briefing on the injunction. That is not surprising, since these causes of action require at least the same showing of causation that doomed

petitioners' WVCCPA claim.[1] Indeed, the *White* plaintiffs and the West Virginia Attorney General emphasized that fact in arguing for a more lenient causation requirement under the WVCCPA.[2] And *White* explicitly acknowledged the reliance requirement for common-law fraud. See Supp. App. 19–20.

Moreover, petitioners' common-law fraud and warranty claims present the same obstacle to class certification as in *McCollins* because both claims also require individualized proof of injury that predominates over common issues. See Resp. Br. 30–31 (common-law fraud requires proof of injury); Pet. App. 44a ("To recover under West Virginia law on any of Plaintiff's economic loss claims, including breach of express and implied warranty . . . Plaintiff must show an actual injury proximately caused by Defendants.").

Thus, *White* undermines completely the basis for petitioners' class-certification motion. Contrary to petitioners' suggestions in their petition for certiorari and their opening brief, therefore, West Virginia

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[1] *See Legg* v. *Johnson, Simmerman & Broughton, L.C.*, 576 S.E.2d 532, 539 (W. Va. 2002) (per curiam); *Horan* v. *Turnpike Ford, Inc.*, 433 S.E.2d 559, 565 (W. Va. 1993) (per curiam); *Mountaineer Contractors, Inc.* v. *Mountain State Mack, Inc.*, 268 S.E.2d 886, 892 (W. Va. 1980); *Jones, Inc.* v. *W. A. Wiedebusch Plumbing & Heating Co.*, 201 S.E.2d 248, 254 (W. Va. 1973); *Sylvia Coal Co.* v. *Mercury Coal & Coke Co.*, 156 S.E.2d 1, 7 (W. Va. 1967).

[2] *See* Response Brief of Respondents Shirley White et al., *White* v. *Wyeth*, No. 35296, 2010 WL 1221433, at *23–26 (W. Va. filed Feb. 22, 2010); Brief of the West Virginia Attorney General As *Amicus Curiae* in Support of Plaintiffs/Respondents, *White* v. *Wyeth*, No. 35296, 2010 WL 1221432, at *21 (W. Va. filed Feb. 22, 2010).

courts would not and could not, in their discretion, certify the now-defunct economic-loss class.

CONCLUSION

For the foregoing reasons and those stated in respondent's previously filed brief, the Court may wish to consider dismissing the writ as improvidently granted, or in the alternative the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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[FILED December 17, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA]

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2010 Term

No. 35296

SHIRLEY WHITE, CATHY DENNISON, AND JENNY TYLER, ON BEHALF OF THEMSELVES AND A CLASS OF OTHERS SIMILARLY SITUATED,

Plaintiffs Below, Respondents

v.

WYETH, F/K/A AMERICAN HOME PRODUCTS, D/B/A WYETH-AYERST LABORATORIES, DANNE MILLER MEMORIAL EDUCATION FOUNDATION, AND KETCHUM, INC.

Defendants Below, Petitioners

Certified Question from the Circuit Court of Putnam County Honorable O. C. Spaulding, Judge Civil Action No. 04-C-127

CERTIFIED QUESTION ANSWERED

Submitted: June 1, 2010
Filed: December 17, 2010

Chief Justice Davis Disqualified
Chief Senior Status Judge Fox, sitting by temporary assignment.
Justice Workman disqualified.
Judge Aboulhosn, sitting by temporary assignment.

JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

2. "In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

3. "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999).

4. "'Proximate cause' must be understood to be that cause which in actual sequence, unbroken by an independent cause, produced the wrong complained of, without which the wrong would not have occurred." Syl. Pt. 3, *Webb v. Sessler*, 135 W. Va. 341, 63 S.E.2d 65 (1950).

5. A private cause of action brought pursuant to the provisions of West Virginia Code § 46A-6-106(a) (2005) of the West Virginia Consumer Credit and Protection Act must allege: (1) unlawful conduct by a seller; (2) an ascertainable loss on the part of the consumer; and (3) proof of a causal connection between the alleged unlawful conduct and the consumer's ascertainable loss. Where the alleged deceptive conduct or practice involves affirmative misrepresentations, reliance on such misrepresentations must be proven in order to satisfy the requisite causal connection.

6. The private cause of action afforded consumers under West Virginia Code § 46A-6-106(a) (2005) does not extend to prescription drug purchases.

McHugh, Justice:

This case is before the Court on certified question raised by the Putnam County Circuit Court in its June 9, 2009, "Order Issuing Certificate of Certified Question," and its July 14, 2009, "Amended Order Denying Defendants' Motion to Dismiss and, Alternatively, for Summary Judgment, but Certifying a Legal Question to the West Virginia Supreme Court of Appeals." The question stems from a suit filed by respondents herein, plaintiffs below, Shirley White, Cathy Dennison, and Jenny L. Tyler as users of hormone replacement drugs, on behalf of themselves and a class of others similarly situated (hereinafter "Respondents"), pursuant to the West Virginia Consumer Credit and Protection Act (hereinafter "WVCCPA"), against petitioners herein, defendants below,[1] Wyeth, f/k/a American Home Products, d/b/a Wyeth-Ayerst Laboratories, and Ketchum, Inc.[2] (hereinafter collectively referred to as "Wyeth"). Following entry of an order denying Wyeth's alternative motions for dismissal and summary judgment propounded on the basis of lack of standing, the following question was submitted for this Court's consideration in accord with West Virginia Code § 58-5-2 (1998) and Rule 13[3] of the West Virginia Rules of Appellate Procedure:

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[1] Dannemiller Memorial Education Foundation was also named as a defendant in the suit but has not joined in this petition.

[2] As noted in the petitioners' brief, Ketchum, Inc. is an advertising and public relations agency that handled marketing of certain products for Wyeth.

[3] The appellate procedure governing certified questions is addressed in Rule 17 of the revised West Virginia Rules of Appellate Procedure effective December 1, 2010.

> Does the "as a result of" language in Section 46[A]-6-106(a) of the West Virginia Consumer Credit and Protection Act require a plaintiff, in a private cause of action under the Act, to allege and prove that he or she purchased a product because of and in reliance upon an unlawful deceptive act?

The lower court answered the question in the negative.

I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying consumer fraud suit was filed pursuant to the WVCCPA in April 2004 by Respondents as private citizens who purchased prescription hormone replacement therapy ("HRT") drugs. West Virginia Code § 46A-6-106(a) specifically provides in pertinent part that:

> Any person who purchases . . . goods . . . and thereby suffers any ascertainable loss of money or property . . . as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article [entitled General Consumer Protection] may bring . . . [a civil] action . . . to recover actual damages or two hundred dollars, whichever is greater.

Respondents' complaint, filed on behalf of themselves and a class of others similarly situated,[4] alleged that the named defendants used unfair and deceptive practices in promoting HRT prescription drug products to doctors and patients for treatment of serious menopausal disorders by using misleading

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[4] As indicated in the lower court's July 14, 2009, order, "[a] class has not been certified in this case."

statements in advertising, marketing and labeling of the products. The complaint does not allege that any of the named Respondents or their doctors ever received, read or relied upon the alleged misrepresentations.

Following completion of class certification discovery, Wyeth filed alternative motions for dismissal or summary judgment on October 27, 2008. In support of these motions Wyeth argued that Respondents could not establish that they had standing to sue because they failed to meet their burden of showing a causal connection between their individual claims of injury and any alleged unfair or deceptive conduct attributed to Wyeth. Wyeth particularly noted the lack of evidence demonstrating that: Respondents received information from Wyeth about HRT; Respondents decided to purchase HRT drugs because of anything they learned from Wyeth; Respondents' treating physicians considered information from Wyeth when they issued the prescriptions for HRT drugs to Respondents; or that Wyeth concealed any studies or other information about HRT drugs.

Respondents countered by arguing that the statutory language only requires that they prove causation by alleging that Wyeth engaged in deceptive practices and that Respondents were harmed. They maintained that reliance on deceptive statements or practices need not be demonstrated because the WVCCPA only requires that their pleadings state that they "suffered ascertainable loss" "as a result of" various unfair and deceptive acts of Wyeth. W. Va. Code § 46A-6-106(a).

The lower court found that the WVCCPA does not require plaintiffs pursuing a private cause of action to allege reliance in their complaints. The court then

denied Wyeth's motions to dismiss or for summary judgment for lack of standing. The lower court observed that the interpretation of the phrase "as a result of" in West Virginia Code § 46A-6-106(a) was a matter of first impression and was a determinative issue in a potentially large and costly suit. Concerned with the seeming conflict between its interpretation of the statutory phrase in light of the constitutional standing requirement regarding causal connection,[5] the lower court certified the issue as a legal question to this Court.

Wyeth petitioned this Court for review of the certified question, which was accepted by order dated November 12, 2009. Thereafter, we granted leave to the Product Liability Advisory Council to file an amicus curiae brief in support of Wyeth. We also granted leave to the West Virginia Attorney General and the West Virginia Association of Justice to file amicus curiae briefs in support of Respondents.

II. STANDARD OF REVIEW

As stated in syllabus point one of *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996), "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*."

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[5] The standing requirement to which the lower court refers is found in syllabus point five of *Findley v. State Farm Mutual Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002), which lists the three elements necessary to establish standing pursuant to Art. 8, § 3 of the West Virginia Constitution. The element significant to the case before us is: "there must be a causal connection between the injury and the conduct forming the basis of the lawsuit." *Id.*

III. PRELIMINARY ISSUES

The question as certified from the lower court is:

> Does the "as a result of" language in Section 46[A]-6-106(a) of the West Virginia Consumer Credit and Protection Act require a plaintiff, in a private cause of action under the Act, to allege and prove that he or she purchased a product because of and in reliance upon an unlawful deceptive act?

The positions of the parties regarding the meaning of the phrase "as a result of" was outlined in the lower court's July 14, 2009, amended order as follows:

> Wyeth argues that the "as a result of" language contained in the statute requires the Plaintiffs to allege that they relied, or their doctors relied, on Wyeth's allegedly deceptive actions when they made the decision to purchase hormone replacement therapy. Under Wyeth's theory, Article VIII of the West Virginia Constitution requires the Plaintiffs to allege reliance as part of their claim that Wyeth violated the provisions of the WVCCPA.
>
> The Plaintiffs argue that . . . the statutory language only requires them to prove causation . . . and [they] may recover regardless of whether the Plaintiffs relied on the deceptive statements of Wyeth. . . . * * * The Plaintiffs aver that W. Va. Code § 46A-6-102(7)(M) when read with W. Va. Code §46A-6-106, does not require the Plaintiffs to prove reliance. * * * Thus, the Plaintiffs' advance the argument that when the Plaintiffs received drugs that were different from or inferior to that which they were entitled to receive, they did not receive the benefit of their bargain, and they therefore suffered an

> ascertainable loss and had a right to bring an action under the WVCCPA. * * *

Based upon the remedial nature of the subject statute, the lower court proposes that the question be answered in the negative. In the context of the question as certified, this would mean that the lower court suggests that a purchaser of goods and services does not have to allege or prove a purchase was made "because of and in reliance upon an unlawful deceptive act" in order to establish a private cause of action pursuant to the WVCCPA. However, a careful reading of the lower court's detailed reasoning in the July 14, 2009, order in light of parties' arguments leads us to believe that the issue is narrower in scope than the question as structured implies. That is, the lower court did not conclude that *neither* reliance *nor* a causal connection need be established in order to pursue a private cause of action under the WVCCPA. To the contrary, the lower court's amended order contained the specific finding that "the 'as a result of language in W. Va. Code 46A-6-106(a) does not require proof of reliance, but only proof of causation." As such, this Court elects to reformulate the certified question so as to more adequately address the dispositive issue presented. *See* Syl. Pt.3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993) (recognizing this Court's authority to reformulate questions certified to it by the circuit courts in order to fully address the law involved in the question). Accordingly, we reformulate the question certified in the following manner:

> Does the "as a result of" language in Section 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act require proof of reliance on alleged affirmative misrepresentations in order

to satisfy the element of causation in private causes of action brought pursuant to the Act?

The parties point to numerous decisions in various jurisdictions regarding reliance as an element in consumer protection cases brought pursuant to state consumer protection statutes. Most states adopted consumer protection legislation in the 1960's and 1970's in reaction to the failure of federal laws to provide consumers with an adequate alternative to the proof requirements of common law fraud to remedy unfair and deceptive trade practices. *See* Dee Pridgen & Richard M. Alderman, *Consumer Protection and the Law* vol. 1, §1:1(2009-2010 ed.); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 10-20 (2006) for historical genesis of consumer protection laws.

The WVCCPA was enacted in 1974 and "is a hybrid of the Uniform Consumer Credit Code and the National Consumer Act and some sections from then-existing West Virginia law." *Clendenin Lumber and Supply Co., Inc. v. Carpenter*, 172 W.Va. 375, 379 n. 4, 305 S.E.2d 332, 336 n. 4 (1983). While all states have consumer protection laws, the provisions of the statutes among the states is far from uniform. Indeed, some state laws do not provide a private right of action[6] and vest all enforcement powers with the government. West Virginia is in the majority of states

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[6] The consumer protection statutes in Iowa and North Dakota do not provide for a private cause of action.

that grant enforcement power to both consumers and the State.[7]

Given the significant differences in the statutes, at the outset we identified those states which have adopted the same relevant statutory language as West Virginia to aid in our review of the numerous and varied judicial decisions addressing the subject here raised.

To this end, we surveyed the statutes of the various states to determine if they contained provisions using the same relevant terminology as West Virginia Code §§ 46A-6-106 and 46A-6-102(7)(M). The italicized phrases in the following recitation of the two statutes was the focus of our undertaking.

> West Virginia Code § 46A-6-106:
>
> (a) Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, *as a result* of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action in the circuit court of the county in which the seller or lessor resides or has his principal place of business or is doing business, or as provided for in sections one [§ 56-1-1] and two [§ 56-1-2, repealed], article one, chapter fifty-six of this code, to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary or proper.

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[7] *See* W. Va. Code §§ 46A-7-108 through -111 (authorizing attorney general to initiate court actions to further WVCCPA purposes).

West Virginia Code § 46A-6-102:

> (7) "Unfair methods of competition and unfair or deceptive acts or practices" means and includes, but is not limited to, any one or more of the following:
>
> (M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, *whether or not any person has in fact been misled, deceived or damaged thereby*[.]

Our study reveals that the private cause of action provisions of twenty-eight states contain the "as a result of" language.[8] Eleven states and the District of Columbia have statutes containing the "whether or not any person has in fact been misled, deceived or

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[8] *See* Alaska Stat. § 45.50.531(a); Ark. Code Ann. § 4-88-113(f); Cal. Civ. Code Ann. § 1780(a); Colo. Rev. Stat. § 6-1-113(1)(a); Conn. Gen. Stat. § 42-110g(a); Fla. Stat. § 501.211(2); Ga. Code Ann. § 10-1-399(a); Idaho Code § 48-608; 815 Ill. Comp. Stat. 505/10a(a); Kan. Stat. Ann. § 50-634(d); Ky. Rev. Stat. Ann. § 367.220(1); La. Rev. Stat. Ann. § 51:1409(A); 5 Me. Rev. Stat. Ann. § 213; Md. Com. Law Code Ann. § 13-408(a); Mich. Comp. Laws § 445.911(3); Miss. Code Ann. § 75-24-15(1); Mont. Code Ann. § 3014-133(1); N.J. Stat. Ann. § 56:8-19; N.M. Stat. Ann. § 57-12-10; Or. Rev. Stat. Ann. § 646.638(1); 73 Pa. Consol. Stat. § 201-9.2(a); R.I. Gen. Laws § 6-13.1-5.2(a); S. C. Code Ann. § 39-5-140(a); S. D. Codified Laws § 37-24-31; Tenn. Code Ann. § 47-18-109(a)(1); Utah Code Ann. § 13-11-19(2); Vt. Stat. Ann. tit. 9, § 2461(b); and Va. Code Ann. § 59.1-204.

damaged" language.[9] Only five states have both statutory provisions.[10] *See also* Carolyn L. Carter, *Consumer Protection in the States, A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Feb. 2009).

IV. DISCUSSION

The lower court began its analysis of the reliance issue by considering Respondents' argument that the "as a result of" language of § 46A-6-106 should be read in conjunction with the definition of unfair or deceptive acts or practices appearing in § 46A-6102(7)(M), which provides that a person does not have to be "in fact . . . misled, deceived or damaged" by the deceptive act or practice. The lower court agreed with Wyeth's position that as a matter of statutory construction, the more specific provisions of what constitutes a private cause of action in § 46A-6-106(a) takes precedence over the general provisions contained in the definitions of § 46A-6-102.[11] No challenge is directed to this construction and we find it be sound.

The lower court then proceeded to address the question of whether the "as a result of" language in § 46A-6-106(a) reflects the Legislature's intent to

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[9] *See* Ariz. Rev. Stat. § 44-1522(A); Del. Code Ann. tit. 6, § 2513(a); D.C. Code § 28-3904; 815 Ill. Comp. Stat. 505/2; Iowa Code § 714.16(2); Kan. Stat. Ann. § 50626(b); Md. Com. Law Code Ann. §13-302; Minn. Stat. § 325F.69(subd.1); N.J. Stat. Ann. § 56:8-2; N.D. Cent. Code § 51-15-02; and S.D. Codified Laws § 37-24-6.

[10] The five states with consumer protection statutes containing both relevant provisions are: Illinois, Kansas, Maryland, New Jersey, and South Dakota.

[11] *See* Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984).

impose a reliance requirement in all private causes of action brought pursuant to the WVCCPA. Finding that the intent of the Legislature was not clear, the lower court proceeded to construe the statute to resolve the ambiguity. After an extensive review of relevant case law from other jurisdictions as well as various authorities addressing the issue, the lower court concluded that, given the overriding remedial purpose of the WVCCPA "to protect consumers from deceptive acts and to prevent producers and distributors from providing false information about the dangers of products to consumers," the "as a result of" language in W. Va. Code 46A-6-106(a) does not require proof of reliance, but only proof of causation. The lower court nonetheless expressed concern that its decision potentially conflicted with the standing requirement that a causal connection exist between the injury and the conduct forming the basis of the lawsuit. It appears that this concern stems from the lower finding that the complaint in this case sufficiently demonstrated a causal connection by simply asserting that an ascertainable loss was suffered as a result of Wyeth's allegedly deceptive practices, and not that the purchase of the HRT drugs was made because of any representations made by Wyeth.

Wyeth first maintains that the lower court's determination regarding reliance is incorrect because the structure and plain language of § 46A-6-106(a) requires proof that the plaintiffs knew of and relied upon the allegedly deceptive conduct. Wyeth proposes that under the plain terms of this statute a plaintiff must allege and prove the following three elements: (1) an ascertainable loss; (2) the occurrence of an unfair or deceptive act or practice; and (3) demonstration that the loss was realized "as a result

of" the improper act or practice. Wyeth insists that the phrase "as of result of" has to be read to mean that a plaintiff relied on the improper act or practice alleged in order to satisfy standing requirements. Following Wyeth's argument, irrespective of the nature of the unlawful practice a seller may have committed, a consumer would only have a cause of action under § 46A-6-106(a) when the consumer is able to demonstrate his or her purchase was made in reliance on the deceptive practice.

Respondents contend that the phrase "as a result of" does not mean that a consumer must produce some concrete evidence of reliance to establish a WVCCPA private cause of action. Instead they maintain that all that must be alleged and proven in a private WVCCPA cause of action is that an ascertainable loss was suffered and that the loss was caused by the unlawful deceptive conduct alleged.

The WVCCPA defines "[u]nfair methods of competition and unfair or deceptive acts or practices" as including "[t]he act, use or employment" of "any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services." W. Va. Code § 46A-6-102(7)(M) (emphasis added). A private cause of action is authorized under the WVCCPA to those who purchase goods "and thereby suffer[ ] any ascertainable loss of money or property . . . *as a result* of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful [pursuant to West Virginia Code § 46A-6-102]." W. Va. Code § 46A-6-106(a) (emphasis added). Moreover, this Court has established that a requisite

element of standing to bring any civil suit is "a causal connection between the injury and the conduct forming the basis of the lawsuit." Syl. Pt. 5, in part, *Findley v. State Farm Mutual Auto Ins. Co.*, 213 W. Va. at 84, 576 S.E.2d at 811. Thus, to state a private cause of action according to the plain language of the WVCCPA and standing requirements a consumer has to allege: unlawful conduct by a seller, an ascertainable loss on the part of the consumer, and a causal connection between the ascertainable loss and the conduct forming the basis of the lawsuit. This leads to the question at hand of whether the "as a result of" language appearing in § 46A-6-106, being susceptible of more than one meaning, should be construed as requiring that the causal connection between the unlawful conduct and the ascertainable injury in all cases be established through proof of reliance upon the alleged misconduct of the seller.

In construing an ambiguous statute, we must determine and adhere to legislative intent. Syl. Pt. 11, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). "In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975). In the introduction to the "General Consumer Protection" article of the WVCCPA – the article in which the private cause of action of consumers at issue here is codified – the Legislature declared that:

> (1) [T]he purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the

> intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. To this end, this article shall be liberally construed so that its beneficial purposes may be served.
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> (2) It is, however, the further intent of the legislature that this article shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest. . . .

W. Va. Code § 46A-6-101. We have recognized the dual legislative purposes of protecting consumers and promoting sound and fair business practices. *McFoy v. Amerigas, Inc.* 170 W. Va. 526, 295 S.E.2d 16 (1982); *State ex rel. McGraw v. Scott-Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). With specific regard to the statutory private cause of action we have said that the WVCCPA was intended "to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." *Id.* at 777, 461 S.E.2d at 523. As a remedial law, "we must construe the [consumer protection] statute liberally so as to furnish and accomplish all the purposes intended." *Id.*

On the issue of legal causation, this Court has defined the concept of proximate cause as "that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred." Syl. Pt. 3, in part, *Webb v. Sessler*, 135 W. Va. 341, 63 S.E.2d 65 (1950). The U. S. Supreme

Court in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), recently examined whether in order to satisfy proximate cause in a civil RICO claim predicated on a violation of the mail fraud statute required the plaintiffs in such case to show that they relied on a defendant's alleged misrepresentations. Rejecting the contention that the proximate-cause analysis applicable to a common-law fraud claim applied, the Supreme Court noted that "[r]eliance is not a general limitation on civil recovery in tort." *Id.* at 655. The Court went on to say in *Bridge* that "while it may be that first-party reliance is an element of a common-law fraud claim, there is no general common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it." *Id.* at 656.

The U.S. Supreme Court's conclusion has particular relevance where, as here, the statutory cause of action envelops deceptive practices involving information being concealed, withheld or omitted. Requiring proof of reliance on the misrepresentation alleged in such instances would virtually eliminate private causes of action authorized by statute for covert deceptive practices. Such finding would violate the "cardinal rule of statutory construction . . . [providing] that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999).

We recognize that some states require reliance on the deceptive practice to be pled and proven in every private consumer protection case, either on the basis of the express language of the enabling statute,[12] or through judicial interpretation of consumer

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[12] *See* Ind. Code § 24-5-0.5-4; Wyo. Stat. Ann. § 40-12-108(a).

protection laws.[13] The judicial decisions from the remaining states can be said to fall within the following categories: those finding that reliance on the unlawful act or practice does not have to be demonstrated as part of a private cause of action; those finding that proof of reliance on a misrepresentation depends upon the facts of the case; and those finding that only a causal connection between the deceptive practice and loss be proven in all cases. *See* Bob Cohen, *Right to Private Action Under State Consumer Protection Act – Preconditions to Action*, 117 A.L.R. 5th 155, 222-244 (compilation of cases within the three classifications).

Our review of the diverse cases and numerous authorities addressing the issue of reliance in the context of private consumer protection causes of action leads us to the conclusion that courts are struggling to arrive at a way to be faithful to the purposes of consumer protection statutes – promoting fair and honest business practices and protecting consumers – without inviting nuisance lawsuits which impede commerce. In determining the meaning of the phrase "as a result of" in the WVCCPA, we find the decisions from other jurisdictions which are most reasonable, practical and fair to all relevant purposes and interests are those which have concluded that proof of a causal nexus between the deceptive conduct giving rise to the private cause of action and the ascertainable loss may require proof of reliance in some but not all instances.

As observed by one authority, "[r]eliance and causation are twin concepts, often intertwined, but

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[13] *See e.g. Zeeman v. Black*, 273 S.E.2d 910 (Ga. App. 1980); *Key v. Lewis Aquatech Pool Supply, Inc.*; 2002 WL 920936 (Va. Cir. Ct. 2002).

not identical, and in some circumstances reliance can be an element of causation." Carolyn L. Carter & Jonathan Sheldon, *Unfair and Deceptive Acts and Practices* § 4.2.12.5, 215 (7th ed., 2008), citing *Stutman v. Chemical Bank*, 731 N.E.2d 608 (NY 2000); *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545 (N.M. Ct. App. 2003); *Sanders v. Francis*, 561 P.2d 1003 (Or. 1977). As aptly illustrated by the Oregon Supreme Court in *Sanders v. Francis*:

> In many cases plaintiff's reliance may indeed be a requisite cause of any loss, i.e. when plaintiff claims to have acted upon a seller's express representations. But an examination of the possible forms of unlawful practices shows that this cannot invariably be the case. Especially when the representation takes the form of a 'failure to disclose' . . ., it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure. Similarly, if the particular violation . . . is a sale made in willful disregard of the advertised price, and intended at the time of the advertisement, then plaintiff's damage results precisely from defendants' reliance on her ignorance, not from plaintiff's reliance on defendants' advertisement. Whether . . . [the consumer protection act] requires reliance as an element of causation necessarily depends on the particular unlawful practice alleged.

Id. at 1006.

Following this reasoning, when consumers allege that a purchase was made because of an express or affirmative misrepresentation, the causal connection between the deceptive conduct and the loss would necessarily include proof of reliance on those overt representations. *Cf. Group Health Plan, Inc. V. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn.2001); *Tucker v.*

Blvd. At Piper Glen LLC, 564 S.E.2d 248 (N.C. Ct. App. 2002); *Feitler v. The Animation Celection, Inc.* 13 P.3d 1044 (Or. Ct. App. 2000); *Schnall v. AT&T Wireless Servs., Inc.*, 225 P.3d 929 (Wash. 2010). Where concealment, suppression or omission is alleged, and proving reliance is an impossibility, the causal connection between the deceptive act and the ascertainable loss is established by presentation of facts showing that the deceptive conduct was the proximate cause of the loss. In other words, the facts have to establish that "but for" the deceptive conduct or practice a reasonable consumer would not have purchased the product and incurred the ascertainable loss. We find that this approach best serves the WVCCPA's dual purpose of protecting the consumer while promoting "fair and honest competition." W. Va. Code § 46A-6-101. Thus, a private cause of action under the provisions of West Virginia Code § 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act must allege: (1) unlawful conduct by a seller; (2) an ascertainable loss on the part of the consumer; and (3) proof of a causal connection between the alleged unlawful conduct and the consumer's ascertainable loss. Where the deceptive conduct or practice alleged involves affirmative misrepresentations, reliance on such misrepresentations must be proven in order to satisfy the requisite causal connection.

Turning to the facts in the matter now before us, we are simply not convinced that a causal connection exists within the context of prescription drug purchases. Prescription drug cases are not the type of private causes of action contemplated under the terms and purposes of the WVCCPA because the consumer can not and does not decide what product to purchase. A New Jersey appellate court in *New*

Jersey Citizen Action v. Schering-Plough Corporation, 842 A.2d 174, (N.J. Super. 2003), *certif. denied*, 837 A.2d 1092 (N.J. 2003), made a related observation in a consumer protection case involving a prescription drug when it said: "[T]he intervention by a physician in the decision-making process necessitated by his or her exercise of judgment whether or not to prescribe a particular medication[,] protects consumers in ways respecting efficacy that are lacking in advertising campaigns for other products." *Id.* at 177-178. After generally noting the essential difference between the pharmaceutical industry and other companies, the New Jersey appellate court further ascertained that the high degree of federal regulation of prescriptive drug products attenuates the effect product marketing has on a consumer's prescriptive drug purchasing decision. *Id.* at 178. This Court has previously taken into account the high degree of federal regulation when deciding a WVCCPA case. *See State ex rel. McGraw v. Bear, Stearns & Co., Inc.*, 217 W. Va. 573, 618 S.E.2d 582 (2005) (concluding that the service of providing securities investment advice did not fall within the scope of the WVCCPA). Additionally one authority suggests that "[t]here is a strong argument that the scope of [consumer protection acts] was never meant to include FDA approved drugs. The clear public policy behind these provisions is that consumer protection laws were meant to fill a gap by protecting consumers where product safety was not already closely monitored and regulated by the government." Victor E. Schwartz, Cary Silverman, Christopher E. Appel, *"That's Unfair!" Says Who – The Government or the Litigant? Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93, 119 (2007). *See also DeBouse v. Bayer AG*, 922 N.E.2d 309, 318 (Ill. 2009) (mere selling of a prescription medication cannot

serve as a basis for a consumer fraud claim). Accordingly, for the reasons stated above, we find that the private cause of action afforded consumers under West Virginia Code § 46A-6-106(a) does not extend to prescription drug purchases. *But see State ex rel. Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 647 S.E.2d 899 (duty of drug manufacturers to warn in context of product liability cases). Consequently, upon remand of this case, an order of dismissal should be entered in keeping with this new point of law.

V. CONCLUSION

For the reasons set forth above, we answer the reformulated certified question as follows:

> Does the "as a result of" language in Section 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act require proof of reliance on alleged affirmative misrepresentations in order to satisfy the element of causation in private causes of action brought pursuant to the Act?
>
> Answer: Yes.

Certified question answered.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 09-1205

IN THE

Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,

Petitioners,

v.

BAYER CORPORATION,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals For the Eighth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae*. Letters from the parties giving consent to the filing of this amicus brief accompany this filing.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases. Throughout its 65-year history, the association has championed the fundamental right of every American to legal recourse for redress of wrongful injury. AAJ views the lower court's decision in this case as one that not only deprives a class of claimants of meaningful remedy that the legislature has created; but also intrudes on the authority of a State, which most often provides legal recourse to individuals, to administer its own laws.

SUMMARY OF THE ARGUMENT

1. America's constitutional blueprint prescribes a federalist system in which the states retain sovereign dignity and independence within their own spheres. This Court has taken care to protect this balance, including its dual system of courts, from overreach by the federal judiciary. The district court's injunction prohibiting West Virginia courts from certifying a class action for recovery under a

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[1] Pursuant to Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

state consumer protection statute transgressed basic tenets of federalism on three separate grounds.

First, the lower court's order violates the Anti-Injunction Act. Congress strictly prohibited federal courts from enjoining state court proceedings except in narrow circumstances. The relitigation exception permits an injunction against relitigation of an issue in state court that was previously decided by the federal court. In this case, the federal court decided only that Plaintiffs' proposed class did not satisfy the requirement under Federal Rule of Civil Procedure 23(b)(3) that common issues predominate over individual ones. The federal court did not decide whether the proposed class met the similar requirement under West Virginia Rule of Civil Procedure 23(b)(3).

The appellate court's conclusion that the federal court can be deemed to have decided a similar state law issue that was not actually litigated is an unacceptably broad and loose interpretation of the relitigation exception. As a result, the West Virginia court was deprived of the opportunity to construe its own procedural rule according to state policies and priorities that may properly differ from the federal court's view.

2. The lower court also erred in deferring to the district court's clearly erroneous interpretation of state substantive law. The district court's determination that individual issues precluded class certification was based upon its interpretation of the West Virginia Consumer Credit and Protection Act ("WVCCPA") as requiring inquiry into the medical records of each plaintiff to establish individualized physical injury.

In fact, the highest court of West Virginia recently held the opposite: that purchasers of a hazardous drug could proceed with a class action under the WVCCPA without individualized proof of physical harm. The district court failed to inquire how the West Virginia Supreme Court of Appeals would interpret the statute in this case. Instead, the district court made its own determination of the prerequisites for recovery under the WVCCPA.

The court of appeals further erred in deferring to the district court's erroneous interpretation of state law rather than undertaking careful *de novo* review. Even if it was uncertain whether the district court's construction was correct, the appropriate course was to certify that question to the West Virginia Supreme Court of Appeals. The appellate court's failure to consider that alternative further undermined the state court's role as the authoritative expositor of state law.

3. Finally, the district court erred in prohibiting West Virginia courts from administering the remedy provided under the WVCCPA using the class action procedure. The Constitution protects the sovereign independence of the States in the operation and procedures of their judicial branches, within constitutional boundaries.

The State obviously has a weighty interest in utilizing the class action device to administer the remedies created by its legislature in an effective and efficient manner. For the district court to block that procedure in favor of its own preferences for administering legal remedies smacks of the kind of "commandeering" this Court has condemned in other contexts. Although state courts are subject to the

Supremacy Clause mandate to enforce federal law as well as state law, they are generally permitted to do so using their own regular procedures, as federal law must take the state courts as it finds them.

In this case, no federal right is at issue and no overriding federal interest outweighs West Virginia's interest in providing its citizens with the legal recourse established by its legislature. Indeed, the injunction does not fulfill its stated purpose of promoting judicial economy and protecting parties from duplicative litigation. Instead, the district court's order requires plaintiffs to bring their claims against the defendant in numerous individual lawsuits. Such an intrusion into the procedures employed by state courts for state residents pursuing a state cause of action is without precedent and should be reversed.

ARGUMENT

I. THE FEDERAL INJUNCTION PROHIBITING WEST VIRGINIA COURTS FROM HEARING A CLASS ACTION BY WEST VIRGINIA PLAINTIFFS UNDER WEST VIRGINIA LAW VIOLATES THE ANTI-INJUNCTION ACT AND UNDERMINES ITS PURPOSE OF PRESERVING THE INDEPENDENCE OF STATE COURTS.

A. Strict Construction and Narrow Application of the Exceptions to Congress's Absolute Prohibition Against Enjoining State Court Proceedings Is Essential to Preserving the States' Role in Providing Legal Remedies to Their Citizens.

AAJ addresses this Court to urge reversal of the decision by the Eighth Circuit to uphold the district court's injunction in this case. That decision is an unprecedented intrusion by a federal court into the substantive law of a state and into the procedural operations of its judicial system. Affirmance would invite dramatic erosion of the protected role of the states in our system of federalism.

The Constitution "reserves to [the States] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden v. Maine*, 527 U.S. 706, 714 (1999). The States "form distinct and independent portions of the supremacy, no more

subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere." *Id.* (quoting *The Federalist* No. 39, at 245 (James Madison) (C. Rossiter ed., 1961)).

Thus, "from the beginning we have had in this country two essentially separate legal systems." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970). Though this "system of dual sovereignty is not a model of administrative convenience . . . that is not its purpose. Rather, '[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 769 (2002) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

This Court has historically devoted careful attention to what Justice O'Connor called "perhaps our oldest question of constitutional law," which consists of "discerning the proper division of authority between the Federal Government and the States." *New York v. United States*, 505 U.S. 144, 149 (1992).

The Court has consistently taught that the Founders' decision to "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), despite inevitable inefficiency and friction, serves Americans well. Healthy federalism allows the States to act "as laboratories for devising solutions to difficult legal

problems," *Oregon v. Ice*, 129 S. Ct. 711, 718-19 (2009) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); assures that state officials "remain responsive to the local electorate's preferences [and] accountable to the people," *New York*, 505 U.S. at 168; and serves "to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse.'" *Federal Maritime Comm'n*, 535 U.S. at 769 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

For these reasons, this Court has admonished the federal judiciary to "be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation." *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 141 (1941).

Setting limits for the federal courts and protecting the states' role was precisely Congress's purpose in enacting Section 5 of the Judiciary Act, shortly after the states ratified the Constitution. *See* Act of Mar. 2, 1793, § 5, 1 Stat. 335.[2]

The current text of the Act states:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where

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[2] For convenience and consistent with the usage of the parties in this case, amicus refers to this provision as the "Anti-Injunction Act." *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (Stevens, J., dissenting).

> necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

Congress recognized that "[p]revention of frequent federal court intervention is important to make the dual system work effectively." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). Consequently, the statutory language expresses Congress's "basic directive 'of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court.'" *Mitchum v. Foster*, 407 U.S. 225, 236 (1972) (quoting *Toucey*, 314 U.S. at 132).

Thus, to safeguard "the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings 'should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.'" *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atlantic Coast Line*, 398 U.S. at 287).

The Anti-Injunction Act imposes "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Mitchum*, 407 U.S. at 229 (citation omitted). As this Court has emphasized, those exceptions "are narrow, and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atlantic Coast Line*, 398 U.S. at 287). In addition,

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.

Atlantic Coast Line, 398 U.S. at 297.

Amicus submits that the lower court's overly broad interpretation of the relitigation exception—precluding not only relitigation of the issue actually decided under Fed R. Civ. P. 23 but also litigation of the issue under the parallel state procedural rule—violated the Anti-Injunction Act.

B. The Lower Court Erred in Holding That the Federal District "Actually Decided" Whether Plaintiffs Met the Predominance Requirement of W. Va. R. Civ. P. 23.

The relitigation exception, permitting a federal court to enjoin state court proceedings "to protect or effectuate its judgments," is founded on "the well recognized concepts of *res judicata* and collateral estoppel" and "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo*, 486 U.S. at 146-47.[3]

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[3] After *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), disavowed a common law "relitigation' exception" to the Anti-Injunction Act, Congress in response enacted 28 U.S.C. § 2283 in its present form, adding the words "to protect or effectuate its judgments," 62 Stat. 968 (1948), to make clear

This Court has stated that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided* by the federal court. . . . [T]his prerequisite is strict and narrow." *Chick Kam Choo*, 486 U.S. at 148 (emphasis added).

The settled rule regarding this prerequisite requires that there be "total identity" between the issue decided in the prior proceeding and the issue to be precluded in the subsequent proceeding. *See Restatement (Second) of Judgments* § 27 & comment c (1980). The American Law Institute explains, "The same-issue requirement is relatively strict, calling for litigation and determination in the initial proceeding not simply of the same kind of issue concerning the appropriateness of aggregation but, rather, the identical issue." ALI, Principles of the Law of Aggregate Litigation § 2.11, comment b (May 2010). The ALI's comment explains that issue preclusion is not appropriate in the circumstances presented in this case:

> Same-issue status is not present when the aggregation question in the first proceeding arose under a procedural rule of the rendering court and the aggregation question in the subsequent proceeding arises under a procedural rule—albeit, perhaps, an identically phrased rule—that need not be

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that federal courts were authorized "to enjoin relitigation of cases and controversies fully adjudicated by such courts." *Mitchum*, 407 U.S. at 236 & n.21 (quoting Reviser's Note).

> interpreted or applied in identical fashion. Issue preclusion is generally not appropriate in such a situation, for *the court in the subsequent proceeding must have the opportunity, if it chooses, to construe its procedural rule differently* on the aggregation question, within the ambit afforded by federal constitutional due process.

Id. (emphasis added).

Finally, this Court has made clear that the determination of what was "actually decided" is to be based on "the precise state of the record and what the earlier federal order *actually* said," by looking to "arguments actually presented to the District Court" and "the precise language of the District Court's order"; it may not be "a *post hoc* judgment as to what the order was *intended* to say." *Chick Kam Choo*, 486 U.S. at 148 (emphasis in original).

In this case, the Eighth Circuit correctly held that federal common law incorporating the West Virginia law of collateral estoppel would determine whether plaintiffs would be precluded from seeking class certification in West Virginia circuit court. *In re Baycol Prods. Litig.*, 593 F.3d 716, 721 (8th Cir. 2010) (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001)). The court, noted that West Virginia law requires that "[t]he issue previously decided [be] *identical* to the one presented in the action in question." *Id.* (emphasis added) (quoting *State v. Miller*, 459 S.E.2d 114, 120 (W. Va. 1995)).

Nevertheless, the court of appeals rejected the argument raised by Petitioners that the district court had decided only that the purported class did not satisfy Fed. R. Civ. P. 23 and had make no determination regarding class certification under W. Va. R. Civ. P. 23. *Id.* at 721-22.

Essentially, the Eighth Circuit concluded that, by deciding that the purported class did not satisfy the "predominance" standard of Fed. R. Civ. P. 23(b)(3), the district court had also "actually decided" the class did not satisfy W. Va. R. Civ. P. 23(b)(3). Neither the record nor the court's order mentions the state rule. The appellate court instead based its conclusion on the fact Petitioners identified "no relevant substantive or procedural differences between the two certification rules," 593 F.3d at 722, and that the texts of the rules, while not identical, "are not significantly different." *Id.* at 723.[4]

AAJ submits that this is the type of enlargement of the relitigation exception through "loose statutory construction," *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atlantic Coast Line*, 398 U.S. at 287), and "judicial improvisation," *Vendo Co.*, 433 U.S. at 643 (plurality opinion) (quoting *Amalgamated Clothing Workers of America v.*

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[4] The Eighth Circuit's suggestion that federal and state procedural rules are identical in this case is belied by the fact that Bayer chose to pursue a federal court injunction, with appeal to the Eighth Circuit and to this Court, rather than simply appear in the Brooke County Circuit Court at Wellsburg, WV, about 35 miles from its corporate headquarters, to enter a defense of collateral estoppel. Bayer clearly—and correctly—believes that the state court would construe its rule differently than federal courts interpret Fed. R. Civ. P. 23.

Richman Bros., 348 U.S. 511, 514 (1955)), that this Court has repeatedly rejected.[5]

This Court clearly laid out the correct analysis of this issue in *Chick Kam Choo*. There, the widow of a worker killed aboard a ship sued under general maritime law in the federal district court located in Houston, which dismissed those claims on federal *forum non conveniens* grounds. Plaintiff then filed the same claims in state court, also located in Houston. The district court issued an injunction staying the state court proceedings, and the Fifth Circuit Court of Appeals affirmed, holding that the district court could preclude plaintiff from relitigating the issue of whether the court was an inconvenient forum, over a strong dissent arguing "that the Texas courts should be allowed to apply their own open courts *forum non conveniens* standard." *Chick Kam Choo*, 486 U.S. at 145.

This Court reversed, holding that the decision under the federal *forum non conveniens rule* did not preclude litigation of the issue whether the state forum *non conveniens rule* would yield a different result. Noting that the relitigation exception must be narrowly construed, this Court held:

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[5] The Eighth Circuit also erred in requiring Petitioners to bear the burden of proving that the relitigation exception did not apply. Rather, "the party pursuing the injunction bears the burden of establishing that the injunction falls within one of the exceptions." *Smith v. Encore Credit Corp.*, 623 F. Supp. 2d 910, 919 (N.D. Ohio 2008). Any doubts must be resolved in favor of allowing the state court to proceed. *Atlantic Coast Line*, 398 U.S. at 297 (quoted *supra*).

> [T]he only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine. Federal *forum non conveniens* principles simply cannot determine whether Texas courts . . . would consider themselves an appropriate forum for petitioner's lawsuit.

Id. at 148.[6]

This Court therefore concluded that "whether the Texas *state* courts are an appropriate forum . . . has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception." *Id.* at 149.[7]

The notion that the federal court's decision under a federal procedural rule cannot stand as a proxy for a decision under a textually similar state rule is particularly apt in the context of class

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[6] Although counsel had argued that Texas courts, which operate under an "open-courts" guarantee in the state constitution, might well be more likely to find Texas a convenient forum, the lower court had not decided that issue. *See Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 314 (5th Cir. 1987) ("No one can say whether Texas courts will place upon this statute the construction for which Madam Choo contends.").

[7] Although *Chick Kam Choo* involved claims under general maritime law, Justice White made clear that the Court's ruling would apply just as strongly in state law cases. "Consequently, in diversity cases . . . a district court's dismissal on *forum non conveniens grounds* cannot serve as a basis for a later injunction if the plaintiff subsequently brings the same action in a state court." 486 U.S. at 151 (White, J., concurring).

certification standards, which allow considerable room for policy considerations. Rule 23 asks, for example, whether joinder is "impracticable," whether representatives will "fairly and adequately protect the interests of the class," whether common issues "predominate" over individual issues, and whether a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(a) & (b)(3).

Thus the decision to certify a class lies within the "wide discretion" of the trial court. *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir.), *cert. denied*, 510 U.S. 991 (1993); *see also*, 7B Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1785 (3d ed.) ("The trial court has broad discretion in deciding whether to certify a class action and its decision will be reversed only if an abuse of discretion is shown.") (citing cases).

Therefore, decisions denying class certification under Fed. R. Civ. P. 23 are not binding on state courts, though the state's rule is substantially similar, because the state court "might well exercise this discretion in a different manner." *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996). *See also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (federal rulings under Fed. R. Civ. P. 23(b)(3) may be persuasive but a state court is "free to make its own determination in this regard."). As a leading treatise observes:

> If preclusion is to be denied, it should be on the ground that many procedural matters may be so far discretionary that

> a second court should be free to make its own determination.

18A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4434 (2d ed.).

In this case, the West Virginia Supreme Court of Appeals has made it very clear that its reading of W. Va. R. P. 23(b)(3) is independent of the text of Fed. R. Civ. P. 23(b)(3) and is not a "Pavlovian" response to federal decisional law. *In re West Virginia Rezulin Litig.*, 585 S.E.2d 52, 61 (W. Va. 2003).

The single authority relied upon by the lower court upholding an injunction against relitigating a federal denial of class certification in state court is *In re Bridgestone/Firestone, Inc., Tires, Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003). That decision upheld only an order enjoining a state court certification of a nationwide class. Judge Easterbrook, writing for the Seventh Circuit, specifically stated that, although the federal court found the nationwide class unmanageable under federal Rule 23, "[s]tate courts are *free to decide for themselves* how much effort to invest" in making state classes manageable under state procedures. *Id.* at 766 (emphasis added).

The decision below is an unprecedented expansion of the "relitigation exception" to the Anti-Injunction Act, precluding "relitigation" of an issue of state procedure that was never actually litigated or decided by the district court.

II. THE LOWER COURT ERRED IN ACCEPTING THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF STATE LAW IN CONFLICT WITH WEST VIRGINIA'S HIGHEST COURT.

A. The Lower Court Failed to Look to the West Virginia Supreme Court of Appeals for Authoritative Interpretation of West Virginia's Consumer Protection Law.

In addition to upholding an erroneous and overly-broad application of the relitigation exception to the Anti-Injunction Act, the Eighth Circuit also erred in upholding the district court's erroneous construction of state substantive law. In so doing, the court undermines the role of the state's highest court as the authoritative expositor of state law.

Petitioners seek to represent a class of "all West Virginia residents who purchased the drug Baycol in West Virginia." *Keith Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (Cir. Ct. Brooke Co., W. Va.). They asserted claims under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), which provides:

> Any person who purchases or leases goods or services *and thereby suffers any ascertainable loss of money* or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action in the circuit court . . . to recover

> actual damages or two hundred dollars, whichever is greater.

W. Va. Code § 46A-6-106(a) (emphasis added). Prohibited acts include breach of express or implied warranty, including warranty of merchantability and fitness for a particular purpose. *See* W. Va. Code § 46A-6-107 & § 46A-6-108.

As the Eighth Circuit stated, the district court denied class certification based on its "determination that all Baycol plaintiffs will need to show an individualized physical injury." *In re Baycol Prods. Litig.*, 593 F.3d at 723. Specifically, the district court determined that it "would be necessary as to each member of the putative class to determine whether the individual person benefitted from or was injured by Baycol," which would require "in depth review of each plaintiff's medical records" and medical history. *In re Baycol Prods. Litig.*, 265 F.R.D. 453, 457-58 (D. Minn. 2008). For example, the medical evidence regarding the named plaintiff Mr. McCollins indicated that Baycol had been effective in lowering his cholesterol and had not resulted in any adverse side effects. Thus, he "suffered no ascertainable loss" under the WVCCPA. *Id.* at 460. The district court concluded that these individual issues of fact would predominate, precluding certification under Fed. R. Civ. P. 23(b)(3). *Id.* at 458.[8]

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[8] The Eighth Circuit stated that, while class certification under Rule 23 is "technically a procedural ruling," it is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 593 F.3d at 722. The fact that the certification denial involved substantive law determinations indicates that it was not reviewable as a final order and thus

Crucially, the federal district court did not look to the West Virginia Supreme Court of Appeals—or to any West Virginia court—for guidance as to the essential elements required for recovery under the WVCCPA .[9]

B. West Virginia's Highest Court Would Hold In This Case That Plaintiffs Need Not Show Individual Physical Harm Under the WVCCPA So That Common Issues Predominate for Plaintiffs' Class.

The plain text of the statute allows a purchaser to recover the purchase price or $200 upon

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not within the relitigation exception. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). In any event, that factor should have warranted closer appellate review. *See, e.g., In re Air Crash Disaster at New Orleans, La* , 795 F.2d 1230, 1233 (5th Cir. 1986) ("To the extent that the decision to allow expert testimony as a source of evidence is significantly intertwined with the underlying substantive law, we will accord it less deference.").

[9] The district court cited two decisions by federal courts in West Virginia for the proposition that causation under the WVCCPA requires proof that the defendant sold the offending product to the plaintiff. Thus a drug company sales representative who did not sell OxyContin to plaintiff could not be held liable under the statute. *Jones v. Purdue Pharma L.P.*, No Civ. A. 5:01-1246, 2002 WL 32097528 (S D. W. Va., Feb 27, 2002) Nor could beer distributors who sold beer to underage minors be held to have caused actual economic injury to the minors' parents. *Bertovich v. Advanced Brands & Importing, Co.*, No. 5.05CV74, 2006 WL 2382273 (N D W. Va. Aug 17, 2006). In this case at hand, plaintiffs allege that they purchased Baycol and thus satisfied the statute's causation requirement as construed in both *Jones* and *Bertovick*.

proof of a prohibited act, such as breach of warranty. The statute requires no proof that defendant caused physical injury or other harm. West Virginia's highest court removed any possible doubt that purchasers of a drug that exposed them to increased risks can recover under the WVCCPA without allegations of physical harm and can proceed as a class without individualized inquiry into whether each purchaser was hurt or helped by the drug. *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52 (W. Va. 2003).

In that case the West Virginia trial court had found the diabetes medication Rezulin "was not 'defective' for the overwhelming majority of patients who found it effective to control their blood sugar . . . and had no side-effects." *In re West Virginia Rezulin Litig.*, No. Civ. A. 00-C-1180-H, 2001 WL 1818442, *5 (W. Va. Cir. Ct., Dec. 13, 2001). The trial court therefore declined to certify the class of purchasers seeking reimbursement under the WVCCPA.

The Supreme Court of Appeals reversed, holding that the purchasers could proceed under the statute without physical injury or individualized inquiry into medical records.

> [T]o make out a *prima facie* case to recover damages for "any ascertainable loss" under W.Va.Code, 46A-6-106, . . . [i]f the consumer proves that he or she has purchased an item that is different from or inferior to that for which he bargained, the "ascertainable loss" requirement is satisfied.

585 S.E.2d at 75. Thus, plaintiffs' allegation that the manufacturer of Rezulin subjected all purchasers to an *increased risk* of liver disease not disclosed to consumers was sufficient to proceed under the statute. *Id.* at 60. The fact that most purchasers did not suffer liver problems or other physical harm was simply "not relevant" to the question of class certification of their claims under WVCCPA. *Id.* at 63.

Plaintiffs' case here is strikingly similar to that presented to the West Virginia court in *Rezulin*. Bayer marketed cerivastatin under its trade name Baycol from early 1998 until it was removed from the market in August 2001, after being linked to 31 deaths in the United States. Subsequent research indicates that cerivastatin was somewhat less effective than other statins in lowering cholesterol, but far more likely to cause rhabdomyolysis, a condition in which the breakdown of skeletal muscle cells overwhelms the kidneys, causing pain, weakness, and, in some cases, renal failure and death. Bruce M. Psaty, Curt D. Furberg, Wayne A. Ray, *et al.*, *Potential for Conflict of Interest in the Evaluation of Suspected Adverse Drug Reactions: Use of Cerivastatin and Risk of Rhabdomyolysis*, 292 JAMA 2622, 2624 (2004). A review of adverse event reports by FDA researchers indicates that cerivastatin was 16 to 80 times more likely than other statins to cause fatal rhabdomyolysis. Judy A. Staffa, Jenny Chang & Lahn Green, *Cerivastatin and Reports of Fatal Rhabdomyolysis*, 346 New Engl. J. Med. 539, 539 (2002). Additionally, company documents revealed that the difference between the information available to the manufacturer and what was disclosed to the public was "striking." Psaty, *et*

al., supra, at 2622. *See generally, In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201-02 (D. Minn., Dec. 09, 2008) (setting forth the background of the litigation and allegations of the nationwide class).

If presented with the question, it is clear that the West Virginia Supreme Court of Appeals would hold that plaintiffs' in this case, like those in *Rezulin*, could make out a *prima facie* case for recovery under the WVCCPA that Baycol was inferior to the medication for which they had bargained and that their proposed class should be certified.

The federal district court in this case did not ask how the West Virginia Supreme Court of Appeals would construe the WVCCPA, but instead struck out on its own. The Eighth Circuit highlighted this error. The court observed that the West Virginia court in *Rezulin* based its class certification decision on its "substantive legal determinations" as to the legal issues and proof requirements under WVCCPA. 593 F.3d at 722-23. The appellate court did not remind the district court of its obligation to apply the interpretation of state law by the state's highest court, but rather upheld the district court's independent construction:

> Likewise, the district court reached its certification decision in this case *based on its own* "evaluation of the legal issues and the proof needed to establish them[,]" namely its determination that all Baycol plaintiffs will need to show an individualized physical injury.

Id. at 723 (emphasis added)

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) mandates that "federal courts sitting in diversity cases, when deciding questions of 'substantive' law, are bound by state court decisions as well as state statutes." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). By ignoring the West Virginia court's *Rezulin* decision and making its own determination of the requisite elements under the WVCCPA, the district court violated what a leading treatise calls "the heart of the *Erie* doctrine." 19 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4503 (2d ed.).

As the Fifth Circuit recently had occasion to point out, where the proper resolution of the case turns on the interpretation of a state statute, "we 'are bound to apply [Texas] law as interpreted by the state's highest court.'" *American Int'l. Specialty Lines Ins. Co. v. Rentech Steel, LLC*, 620 F.3d 558, 564 (5th Cir. 2010) (quoting *Barfield v. Madison County, Miss.*, 212 F.3d 269, 271-72 (5th Cir. 2000)). Although the federal court might not agree with that interpretation of the statute, "we 'are emphatically not permitted to do merely what *we* think best; we must do that which we think the [Texas] Supreme Court would deem best,'" 620 F.3d at 564 (quoting *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986) (en banc)).

The Eighth Circuit also suggested that *Rezulin* might be distinguished as a decision limited to the question of damages, while defendant in this case disputes causation. 593 F.3d at 723 n.4. In fact, the court in *Rezulin* also rejected defendant's causation argument. Defendants in that case contended "that each individual plaintiff will be required to show . . . that the defendants committed

an unfair trade practice or other violation of the Act that caused the plaintiff to buy Rezulin." *Rezulin*, 585 S.E.2d at 72. That is, defendants would require proof that each plaintiff relied on defendant's advertising or warranty. The West Virginia court squarely rejected that contention, and noted that "[c]hallenges based on . . . causation, or reliance have usually been rejected and will not bar predominance satisfaction." *Id.* (quoting 2 *Newberg on Class Actions* § 4.26 at 241 (4th ed.)). In any event, the appropriate inquiry remains one that the court below did not ask: how would the highest court of West Virginia construe the requisite elements for recovery under the WVCCPA?

C. The Court of Appeals Erred In Deferring to the District Court's Erroneous Interpretation of State Law.

The Eighth Circuit further erred by indicating that it would not overturn an injunction that was based on a clearly erroneous interpretation of state law. The court dismissed plaintiffs' arguments that the district court had misconstrued state law as "unavailing" because the application of collateral estoppel is "not dependent on [the] correctness of [the] prior decision" 593 F.3d at 723 (citing *Liberty Mut. Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 763 (8th Cir. 2003)). That decision, however, stands for the separate, sensible proposition that collateral estoppel makes no exception for factual matters—in that case the cause of groundwater contamination—"that were wrongly decided because of insufficient or unavailable evidence." *Liberty Mut. Ins. Co.*, 335 F.3d at 763.

The interpretation of state law in a diversity case, however, is not a question of fact. Erasing any uncertainty on that issue, this Court held in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), that a federal district court's determination of state law is an issue of law subject to *de novo* review.

The Court explained that appellate deference to district court determinations of state law "is inconsistent with the principles underlying this Court's decision in *Erie*." *Id.* at 234. It invites differing interpretations of state law among federal trial courts in the same state and between the federal and state courts, denies the parties meaningful review of state-law claims, and creates a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. *Id.* "We conclude that a court of appeals should review *de novo* a district court's determination of state law." *Id.* at 231. Such independent appellate review "entails a careful consideration of the district court's legal analysis." *Id.* at 232.

By failing to undertake such a careful analysis in this case,—indeed by rejecting such analysis as "unavailing"—the appeals court failed to defend the state court's constitutional role as "unquestionably 'the ultimate exposito[r] of state law.'" *Riley v. Kennedy*, 553 U.S. 406, 409 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

This Court has stated that it will not defer to lower courts on state-law issues where there is "plain error," *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); the lower court's view is "clearly wrong," *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); or its

construction of state law is "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960).

Even if the prerequisites for recovery under the WVCCPA were not clear from the text of the statute or from the interpretation of that statute by West Virginia's highest court in *Rezulin*, this Court has indicated that the correct path does not lie in the federal court's independent assessment of the statute. Instead, where the Court "cannot rely on the [statutory] construction and findings below" and "it is essential that we have the benefit of the law's authoritative construction," certification to the state supreme court "is a method by which we may expeditiously obtain that construction." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395-96 (1988). The appellate court failed to take advantage of this means of obtaining authoritative construction of the state law governing the plaintiffs' causes of action.

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996), and the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks and citations omitted). The decision below undermines this important state responsibility by failing to enforce the rights of West Virginians as enacted by the state's legislature and interpreted by its highest court.

III. THE LOWER COURT ABUSED ITS DISCRETION IN DICTATING STATE COURT PROCEDURE IN STATE LAW CAUSES OF ACTION.

The district court also exceeded its authority in this case by prohibiting West Virginia state courts from utilizing the class action procedure to adjudicate the state law claims of their citizens. The district court did not decide the substantive claims of the absent class members. They "are still free to pursue individual claims in state court." 593 F.3d at 725. However, the district court effectively banned West Virginia's courts from aggregating those state law claims for efficient adjudication. If the courts of West Virginia are to provide legal recourse under the West Virginia Consumer Credit and Protection Act, they must do so, the district court ordered, one case at a time.

This Court has defined "Our Federalism" as

> [A] recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971).

Among those functions, this Court has stated is "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pac. Ry. Co. v. Humes*, 115 U.S.

512, 521 (1885). As one scholar has noted, state courts "are part of the constitutional infrastructure contemplated and required by the Constitution." Vicki C. Jackson, Printz *and* Testa*: the Infrastructure of Federal Supremacy*, 32 Ind. L. Rev. 111, 121-22 (1998).

The procedures by which a State, through its judicial branch, administers such legal redress are matters constitutionally reserved to the State itself. As this Court has observed, among the powers not surrendered to the national government but reserved to the States is "the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line*, 398 U.S. at 285. Thus,

> [T]he constitution . . . recognizes and preserves the autonomy and independence of the States . . . in their judicial departments. Supervision over . . . the judicial action of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference . . . except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.

Erie R.R., Co. v. Tompkins, 304 U.S. 64, 78-79 (1938) (quoting *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893)) (Field, J., dissenting).

West Virginia has made decisions, as has every state, concerning the legal rights and protections enjoyed by its people, including remedies under the WVCCPA. The state has also decided how

best to administer those remedies effectively, consistent with the best use of its judicial resources. The West Virginia Supreme Court of Appeals has explicitly recognized that the class action device "provides trial courts with a tool to vindicate the rights of numerous claimants" who would otherwise have no practical remedy. *Rezulin,* 585 S.E.2d at 62. It promotes justice by ensuring uniformity of outcomes in similar cases. *Id.* Finally, class actions result in "economies of time, effort and expense" by relieving the judicial branch of the burden of adjudicating numerous, substantially identical individual cases. *Id.*

This case presents no countervailing overriding federal interest that might warrant a federal court's order prohibiting state courts from using the class action device. No federal right or cause of action is involved. Plaintiffs' purported class action is simply an aggregation of diversity cases under state law.

The district court stated that its injunction would avoid the irreparable harm to Bayer of having to "relitigate issues previously decided in a federal court" and would "promote judicial economy and protection of the parties from harassing and duplicative litigation." *In re Baycol Prods. Litig.*, MDL No. 1431, 2008 WL 7425712, at *7 (D. Minn., Dec. 09, 2008).

Amicus submits that these concerns are not distinctively federal, nor do they outweigh the State's own interest in administering the statutory remedy afforded to its people by the WVCCPA in accordance with its own regular procedures. Moreover, the district court's injunction does not promote judicial

economy. Nor does it protect Bayer from the onus of having to respond to plaintiffs' claims in state court. Instead, requires the company to respond repeatedly in numerous individual proceedings.

This Court has been vigilant in policing the boundary between appropriate federal and state spheres. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that the federal government may not "commandeer" state legislatures to serve its own regulatory ends. *Id.* at 175. Similarly, the Court in *Printz v. United States*, 521 U.S. 898 (1997), precluded federal commandeering of state executive branch agencies. *Id.* at 935.

State courts stand on somewhat different footing in that the Supremacy Clause mandates that "the Judges in every State shall be bound [by federal law]." U.S. Const. art. VI, § 2. *See Printz*, 521 U.S. at 928-29. Thus, the state courts must entertain federal causes of action when the parties and controversy are properly before it. *Testa v. Katt*, 330 U.S. 386 (1947). However, even when enforcing federal rights, state courts may proceed "according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). This Court has made clear that the States "have great latitude to establish the structure and jurisdiction of their own courts [and] may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Id.* at 372 (citations omitted). As succinctly restated by Professor Hart, the "general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, . . . that federal law takes the state courts as it finds them." Henry M. Hart, Jr.,

The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954).

In diversity cases, where the rule of decision is supplied by state law, the argument against federal court interference with state procedure is even stronger. Indeed, one scholar has suggested that to require state courts to attend to state law claims individually rather than on a class action basis "presents a possible commandeering problem to the extent that these multiple filings increase the burden on the state judiciary." Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 Loy. L.A. L. Rev. 1559, 1614 (2000).

* * *

The "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government." *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). Instead, they "retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999). The district court in this case exceeded its authority by undermining the state's independent responsibility to declare its own law and intruding into its authority to employ its own procedures. The principles underlying our system of federalism call for reversal.

CONCLUSION

For the above reasons, the decision of the Eighth Circuit Court of Appeals below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-1205

DEC 20 2010

In The
Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,

Petitioners,

v.

BAYER CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of issues presented in the petition to companies collectively responsible for a substantial portion of the total U.S. economic activity.

This case addresses the circumstances under which a federal court's judgment denying class action status should be given preclusive effect to petitioners' attempt to relitigate the same issue of class certification in state court. The Chamber's members are frequent targets of class action

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

lawsuits and are interested in ensuring that the rules in class action cases are applied fairly and equally. The Chamber's members are also interested in decreasing the overall costs of litigation and in preventing serial litigation concerning substantially the same issues.

SUMMARY OF ARGUMENT

The underlying question in this case is whether members of a putative national class action whose certification has been denied by a federal court should be allowed to circumvent that denial by relitigating the same certification issues in a state court. Permitting such relitigation would mean giving preclusive effect to class certification decisions only when they favor plaintiffs, thereby enshrining a pro-plaintiff asymmetry and distorting the proper functioning of the class action mechanism. It would also threaten the enormous societal interest in preventing serial litigation, an interest that is heightened in the context of class certification decisions. Class certifications alter parties' bargaining positions and enable extortionate settlements, and data indicate that class actions impose an enormous cost on business and society. If the benefits and burdens of class action law were to be skewed to favor one side in litigation, these costs would be needlessly magnified. Fortunately, neither principles of res judicata nor this Court's prior precedents support such a result.

Petitioners sought to certify an economic class of similarly "affected" West Virginians under a West Virginia consumer protection statute,

notwithstanding the fact that a federal district court in Minnesota had previously denied class action status to another representative of the same putative class. *McCollins v. Bayer Corp.*, 265 F.R.D. 453 (D. Minn. 2008). The court in *McCollins* concluded that petitioners had not established their own injury under the statute and that class certification was inappropriate because individual issues of actual injury would predominate. *In re Baycol Prods. Litig.*, No. 1431, 2008 WL 7425712, at *1-2 (D. Minn. Dec. 9, 2008). Petitioners were adequately represented in *McCollins*, and the class certification issues decided there are the same issues petitioners wish to relitigate here.

Petitioners contend that principles of collateral estoppel and due process prevent the district court from treating them as parties to the prior decision and therefore enjoining them from relitigating the same issues in West Virginia's state courts. But this Court has long recognized that the term "parties" has a flexible, contextual meaning for purposes of res judicata, and has accepted the proposition that unnamed and uninformed parties can have their rights affected by purported class actions that are not ultimately certified. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) the Court held that the filing of an uncertified class action tolled the statute of limitations for absent putative class members, thus effectively expanding their rights, regardless of their knowledge of the class action proceedings and despite the fact that class certification was ultimately denied. The Court cited principles of efficiency and preventing a

multiplicity of actions in support of what has become known as the *American Pipe* doctrine.

The result in *American Pipe* favored putative class members, but the reasoning and principles underlying the decision support respondent here. Recognizing the preclusive effect of the district court's decision on class certification issues in this case will prevent a multiplicity of suits and preserve judicial resources. It will also eliminate the unseemliness of plaintiffs forum shopping for a particularly friendly jurisdiction. It will reduce the availability of socially wasteful serial litigation and is consistent with Congressional enactments such as the Class Action Fairness Act ("CAFA") and the fairness concerns that underlie the basis for diversity jurisdiction itself.

The class action mechanism undoubtedly plays an important and sometimes beneficial role in our legal system. But the asymmetric rule proposed by petitioners, which would accord preclusive effect to class certification decisions only when they favor plaintiffs, would throw off the fundamental balance of the mechanism and make it an instrument of distortion rather than dispute resolution. As the Eighth Circuit recognized below, and as the Seventh Circuit has recognized in similar cases such as *In re Bridgestone/Firestone, Inc. Tire Products Liability Litig.*, 333 F3d 763 (7th Cir. 2003) and *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842 (7th Cir. 2010), *reh'g denied*, 2010 WL 4890698 (Dec. 2, 2010), the petitioners' alternative would invite a multiplicity of suits and the likelihood that a distinctly minority judicial view—perhaps influenced by local concerns

or connections—will prevail over a better considered understanding of the law. Such serial litigation, often in pursuit of objectively weak claims, is unfair to defendants, imposes enormous societal costs and diminishes respect for the law itself.

ARGUMENT

I. BASIC PRINCIPLES OF RES JUDICATA AND JUDICIAL EFFICIENCY SUPPORT THE FINDING OF PRECLUSION IN THIS CASE.

Allowing plaintiffs to relitigate a federal court's denial of class certification would give plaintiffs a systematic and unnecessary advantage, reduce judicial efficiency, and encourage duplicative litigation. The Court need not and should not endorse such a rule, which would fundamentally distort the class action system.

Petitioners are unnamed members of the defined class in *McCollins*, and argue that their asserted right to pursue class status in West Virginia state courts should not be affected by denial of class certification in *McCollins*. Petitioners thus maintain that they should not be treated as parties or privies to the *McCollins* action because the *McCollins* class was never certified. This argument runs counter to basic principles of collateral estoppel.

In *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002), this Court recognized that the "label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various

procedural rules that may differ based on context." Petitioners, however, seek to vary the meaning of party based not on "context," but on whether the *result* of a class certification decision is plaintiff-friendly. Such a rule would give preclusive effect to grants of class certification, while denying it to rejections of class certification. The inherent unfairness of this position is neither mandated by principles of res judicata nor supported by prior decisions of this Court.

Petitioners' position is what the Seventh Circuit described as "heads I win, tails you lose," where the decision of any court denying certification is never given preclusive effect, but a decision granting class certification is. *Bridgestone/Firestone*, 333 F.3d at 767. Having secured a single favorable certification decision, plaintiffs could then invoke res judicata or collateral estoppel no matter how many times their certification arguments had been rejected elsewhere. Judge Posner aptly demonstrated the perversities of such a system, where a single outlier court can effectively overrule the majority:

> If for example class counsel have a 10 percent chance of winning a given statewide class action against a given defendant, and they sue that defendant 50 times (one suit per state), they are pretty certain to win quite a number of their cases . . . . Even if class counsel filed only 12 cases, the probability that defendant would win them all would be only 28 percent ($.9^{12} = .28$). And that probability (the probability of the defendant's winning all the cases) would fall to one-half of one percent

> ($.9^{50}$ = .005) if class counsel sued in all 50 states. And this despite the fact that the defendant in our example has a 90 percent chance of winning any one of the 50 cases.

Sears, 624 F.3d at 849.

The law of res judicata is a useful tool for avoiding these perverse results because it effectively balances individual and societal interests: "Res judicata law's task is to specify which nonparties to consider privies. It demands some substantial reasons in policy ... to bind a nonparty ... outweigh[ing] the social costs." Kevin M. Clermont, *Class Certification's Preclusive Effects*, PENNumbra Vol. 159 (forthcoming March 2011).

This Court's holdings in *American Pipe* and *Crown, Cork & Seal* were based upon a weighing of these social costs. *See Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) ("*American Pipe* and *Crown, Cork* represent a careful balancing of the interests of plaintiffs, defendants, and the court system."); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (same). In *American Pipe*, the Court referred to the policy considerations underlying the adoption of Federal Rule of Civil Procedure 23 as supporting its holding that unnamed class members could have their statute of limitations period tolled by a putative, ultimately uncertified class action. The Court cited "the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. In *Crown, Cork & Seal*, the Court again referenced the "promotion of efficiency and economy of litigation," 462 U.S. at 349, in support of

extending the rule in *American Pipe* to all putative members of a proposed class, not just interveners. In neither case did the Court suggest that the benefit of tolling depended upon whether the absent plaintiff received actual notice of the pending class action, or even that notice was relevant.[2]

Here, petitioners have been denied use of a particular procedural device—the class action—for the simple reason that they were adequately represented before the federal district court that denied certification of the class of which they claim to be members. Petitioners' substantive rights are unaffected, and they remain free to bring their own individual claims on the merits. All they have lost is the opportunity to relitigate the issue of class certification, a procedural matter to which they have no due process right, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764 (2005), and against which must be weighed society's substantial interest in not giving any party to litigation virtually "unlimited bites of the apple." *Van-S-Aviation Corp. v. Piper Aircraft Corp.* (In re *Piper Aircraft Dist. Sys. Antitrust Litig.*), 551 F.2d 213, 219 (8th Cir. 1977).

These social interests are significant because serial class action litigation imposes enormous costs

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[2] The Court has never required actual notice in class certification cases, only the "best notice practicable." *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997), *cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) (individual notice is required only when names and addresses of all class members are "easily ascertainable" through "reasonable effort.") And the Court has never required notice of the pendency of the class certification decision itself

on defendants and on society. Moneys paid to settle claims of little merit are a deadweight loss for society as a whole, effectively transferring money from shareholders to plaintiffs' attorneys. *See, e.g.*, S. Rep. No. 109-14, at 14 (2005) [hereinafter "Senate Report"] ("In too many cases, state court judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel."). Those sums will not be spent on capital improvements, hiring workers, or paying dividends to shareholders—in other words, the productive lifeblood of the economy.

As a matter of principle and doctrine, this Court's precedent makes it clear that the rights of unnamed class members can be affected by proceedings of which they have no notice. In *American Pipe*, that principle worked to the advantage of plaintiffs, since it permitted an unnamed putative class member to deliberately sleep on his or her right to sue and still have that right extended by virtue of a putative class action of which he or she had no knowledge. The question presented in this case is whether the societal interests that justify such a result can only ever benefit plaintiffs, and not defendants.

The answer must surely be no. Societal, judicial, and equitable interests would not materially be advanced by a system where preclusive effects only help plaintiffs. The costs of such a system, however, would be clear and significant. Accordingly, the "efficiency and economy of litigation," *Am. Pipe*, 414 U.S. at 553, and the values of equitable judicial administration demonstrate the importance and

correctness of giving preclusive effect to the district court's class certification decision.

II. DENYING PRECLUSIVE EFFECT TO A DENIAL OF CLASS CERTIFICATION WOULD EXACERBATE THE PERSISTENT ABUSE OF THE CLASS ACTION MECHANISM.

The modern class action mechanism has substantial benefits, but it also has undeniable costs and can be subject to serious abuse. Nowhere is this truer than at the certification stage, where "a single positive trumps all negatives." *Bridgestone/Firestone*, 333 F.3d at 766-67. Allowing plaintiffs to avoid a federal court's denial of certification would substantially and asymmetrically increase the costs and opportunities for abuse, harming business interests and economic growth.

The abuses of the class action mechanism are well documented. The Senate Judiciary Committee Report issued in connection with the passage of CAFA noted four of the most common forms of abuse:

> First, lawyers, not plaintiffs, may benefit most from settlements. Second, corporate defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices. Third, constitutional due process rights are often ignored in class actions. Fourth, expensive and predatory copy-cat cases force defendants to litigate the

> same case in multiple jurisdictions, driving up consumer costs.

Senate Report at 14. Permitting plaintiffs to relitigate issues of class certification in state court despite an adverse federal judgment would only make matters worse on all counts.

First, the class action mechanism provides a powerful incentive for plaintiffs' lawyers to engage in collusive settlements with defendants to enrich themselves at the expense of the class. *See, e.g., Sears*, 2010 WL 4890698, at *4 ("[T]he structure of class actions under Rule 23 of the federal rules gives class action lawyers an *incentive* to negotiate settlements that enrich themselves but give scant reward to class members.") (emphasis in original).[3]

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[3] *Accord Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999) (noting great incentive for class counsel to settle for any amount that will survive a fairness hearing); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 7 (1st Cir. 1999) ("[C]ircumstances unique to the complex litigation context sometimes tempt class counsel and/or named class plaintiffs to conclude settlements that are not in the best interests of absent class members."); *Vollmer v. Selden*, 350 F.3d 656, 6560 (7th Cir. 2003) (class counsel may settle claims "for significantly less than they are worth, not because they think it is in the class's best interest, but instead because they are satisfied with the fees they will take away"), Bruce Hay and David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1390 (2000) (raising concern that class action settlements "will give class members too little, because class counsel will be tempted to enter into a 'sweetheart' or collusive deal with the defendant."); Andrew Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. Legal Stud. 113, 117 (1976) (empirical study suggesting that attorneys who settled class actions rather than

This "inherent motivation" for class action attorneys "to enrich themselves at the expense of the class," *Sears*, 2010 WL 4890698, at *4, has often resulted in class action settlements that provide little, if any, relief to class members while handsomely rewarding class counsel. *See* Senate Report at 14-20 (describing various settlements). The effect has been a transfer of wealth from businesses to plaintiffs' lawyers, not to the class members. *Id.* at 4

Due to the enormous costs of litigation, defendants face enormous pressure to settle even frivolous cases, leading to what the Senate Report referred to as "judicial blackmail." *Id.* at 20. Numerous courts, including this Court, have recognized the potential for extortionate settlements created by abuse of the class action mechanism. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008) (plaintiffs with meritless claims may "extort settlements from innocent companies").[4] The risk of a potentially

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taking them to judgment received an average fee premium of $104,000), Jeffery W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 Wash Univ. L. Quarterly 1127, 1214 (2005) (settlement of frivolous class claims "may be unduly generous to counsel, relative to class members, and may create problems of conflict of interest that would not arise for individual cases"); *see also Sears*, 2010 WL 4890698, at *5 (collecting authorities).

[4] *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("The very pendency of a [class action] lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit"); *Jones Motor Co., Inc. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190, 1193 (7th Cir. 1999) ("[I]t is well known

devastating damages award is often more than a company can bear.[5]

Denying preclusive effect to federal court decisions rejecting class certification would significantly increase the opportunities for extortionate settlements and perverse settlement incentives, because certification is the point at which such opportunities arise. As Judge Posner has noted, certification of a class action, even one lacking in merit, "forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n.8 (3d Cir. 2001)

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that frivolous class actions can sometimes extort sizeable settlements from the defendants"); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 7 (1st Cir. 1999) (recognizing that "little-to-lose" situations in the class action context "sometimes cause concern because they raise the specter of extortive legal proceedings pressed not to redress real wrongs, but to realize upon their nuisance value") (internal citations omitted).

[5] *See, e.g., Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (recognizing the potential for a "devastatingly large damage award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class"); *Castano v. Am. Tobacco Co.*, 884 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"), *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight.").

(recognizing that class certification may present "acute and unwarranted pressure on defendants to settle" because of the size of the class and number of claims). The certification decision is therefore the heart of the class action mechanism. Petitioners' proposed rule would make it a stage that defendants cannot really win and plaintiffs cannot really lose.

If plaintiffs are not subject to preclusion with regard to adverse certification decisions, they will simply relitigate their certification claims before another judge. And in doing so, plaintiffs' attorneys can and will take advantage of certain state courts that have become known as "magnet" jurisdictions for the plaintiffs' bar. Senate Report at 22-23. For example, in one rural county in Illinois covering less than 750 square miles, class action filings jumped from two in 1998 to more than 100 by 2003, nearly all having nothing to do with the venue itself. *Id.* at 13 (citing John H. Beisner and Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court*, 25 Harv. J. L. & Pub. Pol'y 143, 161 (2001)).

Such jurisdictions engage in "so-called 'drive-by class certification' . . . in which a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint." Senate Report at 23. One "state court judge certified a nationwide class on the day [the] complaint was filed, without awaiting a response from defendants and without giving reasons." *Bridgestone/Firestone*, 333 F.3d at 765. The plaintiffs' bar often seeks out such judges, filing "copy cat" class actions, engaging in "blatant forum

shopping," and selecting venues with "a receptive judge who will rapidly certify a class." Senate Report at 23. The courts that are selected are typically plaintiff-friendly jurisdictions that are hostile to outsiders or accord insiders preferential treatment. *Id.* at 6 ("[F]requently in such cases, there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states"). This unseemly forum shopping erodes respect for the legal system and the rule of law, fostering a perception that justice is an insiders' game. *Id.* at 20-23 (discussing class action suits that encourage unfair substantive outcomes and lack of uniform results).

Petitioners' approach would effectively encourage such forum shopping by giving outlier "magnet" jurisdictions the power to certify class actions that had been rejected in federal court.[6] Having secured one such win in an outlier jurisdiction, no matter how many times they had been denied elsewhere, plaintiffs would then be in a position to force a settlement. *See Sears*, 2010 WL 4890698, at *5 (class counsel's strategy "is to bring identical or similar suits in different jurisdictions until he wins one, then use the judgment in that suit as res judicata or collateral estoppel in the next suit, and the next, and the next, until [defendant] gives up").

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[6] The instant case is something of an outlier in that it was filed before CAFA's effective date, and would have been removed to federal court had it been filed after. But that is all the more reason for this Court to embrace a preclusion principle that is in keeping with CAFA's aims.

CAFA was enacted to address these very problems. *See* CAFA, Pub. L. No. 109-2, 119 Stat. 4 (2005). CAFA's purpose is to cut down on the abuses that had "adversely affected interstate commerce," discouraged innovation, and raised consumer prices. *See* CAFA § 2(a)(2) & (b)(3).

Despite the best efforts of CAFA, class action litigation remains a serious problem for the business community today. That problem has been exacerbated by the recent national economic crisis, as companies struggling to regain their footing are buffeted by ever-increasing pressure to settle class action lawsuits. *See, e.g.*, Ellen M. Ryan and Laura E. Simmons, *Securities Class Action Settlements: 2009 Review and Analysis*, Cornerstone Research 1 (2010) (noting 39 percent increase in dollar value of securities class action settlements from 2008 to 2009).

These class actions impose significant costs on companies and shareholders. Between 2000 and 2004, American companies spent an average of $3.2 billion per year on securities class action settlements alone. *See* Ryan & Simmons at 1. Tort liability has continued to rise, reaching $254 billion by 2008—equivalent to 1.8% of the nation's GDP. Towers Perrin, *2009 Update on U.S. Tort Cost Trends* 3, 13 (2009). These costs do not merely affect large corporations and their insurers. In 2008, small businesses carried $105.4 billion of the national tort liability—roughly forty percent of all tort liability that year and more than eighty percent of all business tort liability. U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small*

Business 1 (July 2010). One third of those tort costs were paid by small businesses directly out of pocket. *Id.*

Permitting relitigation of certification questions would increase these costs even further. Businesses incur prohibitive costs throughout the life of a class action suit, but particularly at the early stages. *See* Elizabeth M. Williamson, *When Talk Isn't Cheap: The Hidden Costs of Communication with Putative Class Members for Class Action Defense Counsel in a Post-Financial Recession World*, 5 Entrepreneurial Bus. L. J. 453, 454 (2010). One of the fundamental asymmetries of class action litigation is that the defendants bear almost all the cost of discovery. Individual plaintiffs will rarely have more than a handful of readily accessible documents, whereas discovery costs to businesses, particularly costs stemming from modern e-discovery, can be enormous. *See, e.g.*, *Sears*, 624 F.3d at 849-850 ("[T]here is far more evidence that plaintiffs may be able to discover in defendants' records . . . than vice versa."); *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376. 1381 (N.D. Ga. 2009) ("The enormous burden and expense of electronic discovery are well-known. Taxation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery."). Requiring businesses to repeatedly litigate the same certification issues will further increase these burdens, in some cases forcing settlement of even the flimsiest case on the basis of the discovery costs alone.

In addition to legal fees and other discovery costs, there are real opportunity costs associated with time spent defending wasteful litigation. Management and employees spend their time attending depositions, meeting with defense counsel and complying with document requests, leading to lower productivity. Industry sectors avoid innovation efforts that bear a risk of failure because the resultant hit to the company's stock price yields a nearly automatic securities class action complaint.

These are not merely costs to business executives or insurance providers. All stakeholders in a business suffer from the exorbitant costs of meritless complaints. Shareholders lose value as the publicity of a class action takes its toll; employees face cutbacks as cash reserves are depleted and new business ventures postponed; consumers are met with higher prices to offset the price of e-discovery and opposing counsel fees; and society as a whole loses out on the opportunities that would have been pursued by businesses that must instead spend their time in the courtroom.[7]

Obviously, many class action complaints have merit. But the potential for the plaintiffs bar to shop onerous claims from venue to venue in an effort to obtain class certification, and threaten corporate

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[7] *See, e.g.*, Council of Economic Advisors, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* 1 (2002) ("[T]he cost of excessive tort may be quite substantial, with intermediate estimates equivalent to a 2 percent tax on consumption, a 3 percent tax on wages, or a 5 percent tax on capital income.").

defendants with millions in litigation expenses, is an unnecessary hindrance to both legitimate business operations and proper judicial administration in America. The Court should embrace the opportunity this case presents to draw a line against such practices by recognizing the fairness of collaterally estopping petitioners from attempting to have another court overrule the district court's class certification decision.

CONCLUSION

For the reasons stated above, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-1205

In the Supreme Court of the United States

KEITH SMITH and SHIRLEY SPERLAZZA,

Petitioners,

v.

BAYER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 99 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 900 briefs as *amicus curiae* in both state and federal courts, including more than 75 in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.[1]

Because PLAC's members often face parallel litigation relating to product-liability claims in state and federal courts, PLAC has substantial experience

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

with the circumstances in which the relitigation exception to the Anti-Injunction Act is invoked. PLAC believes that this exception properly does and should protect a wide variety of federal judicial decisions, thus ensuring finality of federal judgments and efficiency in the judicial system.

SUMMARY OF ARGUMENT

Because respondent has ably addressed the specific issues raised in petitioners' brief in this case, PLAC is filing this *amicus* brief to analyze at greater length one of the underlying legal doctrines at issue—how the Anti-Injunction Act and its exceptions should be interpreted. These doctrines are critical to the relationship between the state and federal judicial systems in numerous contexts.

Given our unique federal structure, complex litigation often involves parallel actions in state and federal courts. Although courts must avoid "'needless friction between state and federal courts'" (*Atl. Coast Line R.R.* v. *Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970) (quoting *Okla. Packing Co.* v. *Okla. Gas & Elec. Co.*, 309 U.S. 4, 9 (1940))), Congress has expressly recognized that direct interaction may be required in limited circumstances.

In particular, when a federal court has finally decided a claim or an issue, the loser may not move to state courts for a second bite. The legal system, instead, is founded on finality and repose, values that ensure the efficient use of limited judicial resources. When a losing party nonetheless attempts a collateral challenge in a state forum, a federal court may, pursuant to the "relitigation exception" of the Anti-Injunction Act, protect its decisions through the issuance of appropriate injunctive relief. As this Court

has found, the relitigation exception is necessary "to ensure the effectiveness and supremacy of federal law." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146 (1988).

Because the exception incorporates principles of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion), it may be invoked in a wide variety of settings. *Chick Kam Choo*, 486 U.S. at 146-147. Not only does it apply to a federal court's final adjudication of *claims*, but the exception may also find application in a federal court's resolution of certain *issues*, such as class certification, personal jurisdiction, and choice of law. This expansive nature of the relitigation exception is critical to the efficiency and fairness it is designed to achieve.

A federal court's decision to enjoin state proceedings plainly has significant implications with respect to the nation's federalist structure. Several doctrines have properly emerged, therefore, to cabin the usage of the relitigation exception in any particular case. But contrary to the suggestion of petitioners and their *amici*, the interests of states are preserved not through narrowly construing the *kinds* of federal decisions to which the relitigation exception may attach. Instead, federalism is protected through the several well-established case-by-case limitations that control *when* a federal court can and should actually invoke its equitable authority to enjoin state proceedings.

Here, the courts below properly applied the relitigation exception. None of the relevant limitations on federal power are implicated. The Court should accordingly affirm. In so doing, the Court will resolve the particular dispute at hand; but as important, the Court will reaffirm the appropriate scope of the reli-

tigation exception to the Anti-Injunction Act, which is significant in a wide array of cases.

ARGUMENT

THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT AUTHORIZES FEDERAL COURTS TO ENJOIN STATE COURTS FROM RELITIGATING FINALLY-DECIDED CLAIMS AND ISSUES.

Petitioners suggest that the Anti-Injunction Act (the Act) applies narrowly to "only truly substantive ruling[s]." Pet. Br. 24. They further contend that use of the relitigation exception is inappropriate here because a class determination is a "procedural ruling" issued by the federal court. *Id.* at 8. Petitioners' apparent interpretation of the Act, however, is inconsistent with precedent, would undermine the efficient and fair administration of the courts, and would upset the appropriate balance of federal and state interests in our federalist system.

The Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except [1] as expressly authorized by Act of Congress, or [2] where necessary in aid of its jurisdiction, or [3] to protect or effectuate its judgments.

28 U.S.C. § 2283. Congress, accordingly, has carved out three specific circumstances in which a federal court may enjoin a state proceeding. When one of the exceptions is implicated, the All Writs Act provides affirmative statutory authorization for federal courts to enjoin state proceedings. 28 U.S.C. § 1651(a). See

also *United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977).

The third exception—that a federal court may enjoin state proceedings "to protect or effectuate its judgments"—is often referred to as the "relitigation exception." It "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo*, 486 U.S. at 147. The exception, therefore, is "founded in the well recognized concepts of *res judicata* and collateral estoppel." *Ibid.* Appropriate functioning of this exception is critical, this Court found, "to ensure the effectiveness and supremacy of federal law." *Id.* at 146.

Because it incorporates principles of collateral estoppel, the relitigation exception applies to a wide variety of federal judicial decisions, not just final decisions on the merits. It has proven crucial, for example, to the management of complex multi-party litigation, such as federal multi-district proceedings.

This approach to the relitigation exception also accords with principles of federalism. Although a federal court may fashion injunctions to protect an assortment of federal determinations, several doctrines restrict the permissible usage of an injunction in any particular case. These limitations ensure that state and federal interests are properly calibrated.

A. The Relitigation Exception Is Critical To The Efficient And Fair Administration Of The Courts.

The fundamental purpose of the relitigation exception is to preserve the "supremacy of federal law" (*Chick Kam Choo*, 486 U.S. at 146), and in so doing, to create enormous judicial efficiencies that benefit

the courts and parties alike. At bottom, the relitigation exception is rooted in the need for finality of decisions, notwithstanding the dual system of state and federal courts. See *Fernandez-Vargas* v. *Pfizer Pharm., Inc.*, 522 F.3d 55, 68 (1st Cir. 2008).

The relitigation exception achieves this end by incorporating principles of both *res judicata* and collateral estoppel. *Chick Kam Choo*, 486 U.S. at 146-147. The exception thus properly applies to a wide range of different judicial orders. This broad applicability underscores the importance of the relitigation exception, which preserves judicial resources and spares parties from continuous relitigation of otherwise-settled issues. Because an interpretation of the Act that protects this wide-ranging application to many kinds of orders is well established and fundamental to the very meaning of the relitigation exception, it is not, as petitioners contend, an "enlarge[ment]" of the exception "by loose statutory construction." Pet. Br. 14.

1. Judicial efficiency and finality inform the relitigation exception.

The relitigation exception to the Anti-Injunction Act reflects a fundamental need in the judicial system for efficient and final resolution of disputes. This Court has long recognized the necessity of finality and repose. "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938). There is a "historic wisdom in the value of repose." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 219 (2005) (internal quotation omitted). Indeed, it is "[a] fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, * * * that a

'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies.'" *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (alteration omitted) (quoting *Southern Pac. R.R.* v. *United States*, 168 U.S. 1, 48-49 (1897)).

Collateral estoppel and *res judicata* are designed to ensure both efficiency and fairness. As this Court has explained, "[c]ollateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). See also *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 553 (1990) ("Collateral estoppel protects parties from multiple lawsuits and the possibility of inconsistent decisions, and it conserves judicial resources."); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").

The history of the relitigation exception underscores that these values lie at its heart. In 1948, Congress codified the exceptions to the Anti-Injunction Act for the express purpose of superseding this Court's decision in *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118 (1941), and to "restore 'the basic law as generally understood and interpreted prior to the *Toucey* decision.'" *Mitchum* v. *Foster*, 407 U.S. 225, 236 & n.21 (1972) (citing H.R. Rep. No. 80-308,

(1947)) (recounting history of Anti-Injunction Act exceptions). Congress explicitly and approvingly referenced the "vigorous dissenting opinion" in *Toucey* as motivation for the restoration of power to the federal courts. *Ibid.* Justice Reed's dissent in *Toucey*, in turn, argued that a robust relitigation exception is necessary for efficient administration of justice. 314 U.S. at 143-145 (Reed, J., dissenting). Without a relitigation exception,

> a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.

Id. at 144. An injunction ground in the relitigation exception, Justice Reed explained, "forbids parties bound by its decree to fight the battle over on another day and field." *Ibid.*

Justice Reed's dissent was by no means an isolated observation. Prior to *Toucey*'s repudiation of the common-law doctrine, the lower courts routinely focused on the efficiency of finality engendered by the common-law relitigation exception. "[U]seless and baseless litigation by subsequent suits in courts, with no appellate jurisdiction to relitigate issues decided in a federal court * * * inflict[s] ample injury to sustain a suit in equity." *St. Louis-San Francisco Ry.* v. *McElvain*, 253 F. 123, 135 (E.D. Mo. 1918). The relitigation exception thus prevents "one * * * party to the original suit * * * from relitigating the questions of right which have already been determined." *Wil-*

son v. *Alexander*, 276 F. 875, 880 (5th Cir. 1921). In restoring federal law to the pre-*Toucey* standards through the 1948 amendment (see *Mitchum*, 407 U.S. at 236 & n.21), there can be no doubt that Congress expressly sought to restore to the federal courts the authority to protect their orders, and thereby ensure finality of judgment.

And this is precisely how the lowers have seen the relitigation exception following the 1948 codification. Indeed, courts routinely note the efficiency and repose engendered by it. As one court explained:

> In a case such as this it would be a disservice not only to the defendants, but also to the state judiciary, to allow the entire record to be placed in the lap of the New York State courts to be argued over by lawyers and puzzled over by judges for years to come. While comity requires respect for the ability of the state courts to decide the issue of res judicata properly, it also requires sympathy for their calendar problems and for the task that would confront them were this litigation to be imposed upon them.

Browning Debenture Holder's Comm. v. *DASA Corp.*, 454 F. Supp. 88, 105 (S.D.N.Y.), aff'd, 605 F.2d 35 (2d Cir. 1978). The First Circuit has similarly explained that "[a]pplication of the exception (1) reinforces the preclusive effect of federal court judgments, (2) ensures the finality of federal court decisions, and (3) prevents harassment through repetitive state court proceedings of those litigants prevailing in federal court." *Fernandez-Vargas*, 522 F.3d at 68. See also *In re Nat'l Student Mktg. Litig.*, 655 F. Supp. 659, 663 (D.D.C. 1987) ("[T]he relitigation exception was adopted precisely to prevent repetitive suits generat-

ing unnecessary litigation by parties and needless friction between the courts.").

Indeed, whenever there exists "contemporaneous exercise of concurrent jurisdictions, * * * by state and federal courts," principles of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" routinely come into play. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (internal quotation omitted). Preservation of federal court decisions, and the efficiency and fairness this doctrine begets, is evident throughout a wide variety of federal litigation.

2. *The relitigation exception may appropriately attach to a broad variety of federal decisions.*

Petitioners appear to claim (Pet. Br. 24) that the injunction in this case was improper because a ruling on class certification is separate from a final decision adjudicating the merits underlying a suit. This argument ignores the fact that the relitigation exception "is founded in the well-recognized concepts of *res judicata and collateral estoppel*," and thus incorporates *both* of those doctrines. See *Chick Kam Choo*, 486 U.S. at 147 (emphasis added).

Collateral estoppel, by its very nature, may attach to judicial decisions other than a final judgment. "It is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion." *Christo* v. *Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000). Thus, pursuant to the collateral-estoppel doctrine, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a

different cause of action involving a party to the first case." *Allen*, 449 U.S. at 94. Collateral estoppel is expansive because it "can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165, 170-171 (1984).

A federal court's final resolution of a particular *issue* therefore may trigger the relitigation exception, regardless of whether the court has resolved the underlying *claim*. Indeed, courts apply the relitigation exception to federally decided *issues* in a wide variety of contexts. The breadth of the relitigation doctrine's application is ultimately essential to its purpose of ensuring supremacy of federal law and creating the substantial efficiency that this finality ensures. Several applications of the relitigation exception have proven critical for the business community:

Class certification. As respondent correctly explains (Resp. Br. 17-31), application of the relitigation exception is sometimes appropriate in the context of class-certification determinations. Otherwise, "[r]elitigation can turn even an unlikely outcome"—the certification of a highly inappropriate class—"into reality." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766 (7th Cir. 2003). The exception thus "permits a federal court to issue an injunction that will stop such a process in its tracks and hold *both* sides to a fully litigated outcome, rather than perpetuating an asymmetric system in which class counsel can win but never lose." *Id.* at 767.

This doctrine is essential because an enormous number of lawyer-driven class action lawsuits are filed annually, with many overlapping class actions

seeking relief for the same underlying conduct. As one report recently explained, 2,354 class actions were filed in federal court between January and June 2007 alone. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, at 3, Apr. 2008, *available at* http://tinyurl.com/273h2bh. In such cases, a "parallel state action[]" may create a "particularly significant" risk of undermining federal resolution of complex litigation. *In re Diet Drugs*, 282 F.3d 220, 236 (3d Cir. 2002) (discussing jurisdiction exception to the Anti-Injunction Act). Indeed, in PLAC's experience the same class-action attorneys will bring virtually the same claim in numerous forums throughout the country, using plaintiffs as pawns, hoping to win just once. Cf. *Thorogood* v. *Sears, Roebuck & Co.*, 624 F.3d 842 (7th Cir. 2010). The relitigation exception empowers courts to ensure that a large number of different class action suits in multiple courts cannot have the effect of nullifying a federal decision. See *In re Bridgestone/Firestone*, 333 F.3d at 766.

Multi-district litigation. As with enforcing their class-action determinations in appropriate contexts, federal courts sometimes also require injunctive power to protect a multi-district litigation from inappropriate disruption by parallel state proceedings. That is precisely what occurred in this case. See Resp. Br. 3. Similarly, in *Blue Cross of California* v. *SmithKline Beecham Clinical Laboratories, Inc.*, 108 F. Supp. 2d 130, 136 (D. Conn. 2000), the district court enjoined the prosecution of state actions in order to protect its ability to resolve a complex MDL. And in *Winkler* v. *Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996), the Seventh Circuit used the related jurisdiction-preserving exception, finding that

"courts have extended the exception to consolidated multidistrict litigation, where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation."

The multidistrict litigation mechanism is a necessary component of modern litigation, and ensures coordination across diverse actions seeking relief arising out of the same underlying circumstances. Indeed, "Congress established MDL protocols" specifically "to encourage efficiency." *In re Guidant Corp., Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007). And this process has worked: "[t]he MDL Statute has proven to be a useful procedural tool for consolidating thousands of related cases pending in federal courts and has led to substantial judicial and party savings." Yvette Ostolaza & Michelle Hartmann, 26 REV. LITIG. 47, 75 (2007). The exceptions to the Anti-Injunction Act have regularly served as a critical means of precluding parallel state proceedings from derailing federal MDLs. While the question whether such an injunction is necessary in a specific case is of course highly idiosyncratic and the circumstances where such injunctions may be necessary are limited, the relitigation and jurisdiction-preserving exceptions are important tools the federal courts use to manage complex litigation in appropriate cases.

Choice of law. A federal court's determination of a choice of law question may, in certain cases, have preclusive effect in a subsequent suit. Thus, a federal court may issue an injunction through the relitigation exception to preclude reconsideration of a choice-of-law decision in state proceedings. *See Chick Kam Choo*, 486 U.S. at 148-149. See also *Quintero* v. *Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir.

1990) ("We must conclude that the district court did not abuse its discretion by enjoining Mr. Quintero from relitigating the choice-of-law issue in Louisiana state court.").

Personal jurisdiction. If a federal court grants a motion to dismiss for lack of personal jurisdiction, this order may also form the basis of an injunction precluding the losing party from relitigating the issue in a state forum. See *Bordelon* v. *Jefferson Feed & Garden Supply, Inc.*, 703 F. Supp. 25, 27-28 (E.D. La. 1988) ("The Court finds that the personal jurisdiction issue in the case at bar fits within the relitigation exception to the Anti-Injunction Act.").

Compelling arbitration. Likewise, a federal court's decision to compel arbitration is entitled to protection against challenge in state court. *Am. Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 714 n.3 (5th Cir. 2002) (Dennis, J., concurring). A federal court may enjoin a "state-court suit [that] seeks to relitigate the validity of the arbitration clause and obtain judicial resolution of the underlying dispute." *Great Earth Cos.* v. *Simons*, 288 F.3d 878, 894 (6th Cir. 2002). See also *TranSouth Fin. Corp.* v. *Bell*, 149 F.3d 1292, 1297 (11th Cir. 1998) ("When a federal court has ordered arbitration, a stay of the state-court action may be necessary to insure that the federal court has the opportunity to pass on the validity of the arbitration award.").

Enforcement of an arbitral award. And when a party enforces an arbitral award in federal court, a district court may enjoin attempts by the losing party to frustrate execution of the award in state court. See, *e.g.*, *G.C. & K.B. Invs., Inc.* v. *Wilson*, 326 F.3d 1096, 1106-1107 (9th Cir. 2003); *United States* v. *Am.*

Soc'y of Composers, Authors & Publishers (In re Karmen), 32 F.3d 727, 731 (2d Cir. 1994).

Enforcement of a federal judgment. In a similar vein, a federal court may issue an injunction pursuant to the relitigation exception to enjoin efforts to enforce a federal judgment in state courts, where the state proceedings are an attempt to reopen the federal judgment. See *Flanagan* v. *Arnaiz*, 143 F.3d 540, 545-546 (9th Cir. 1998).

These applications of the relitigation exception to specific legal determinations in ongoing litigation are frequently of critical importance to the business community and other litigants. And they are largely uncontroversial. Furthermore, these are just a sampling of the circumstances in which the relitigation exception has appropriately been held to apply. The point is that, by empowering federal courts to protect their decisions against collateral challenge, the relitigation exception helps foster finality and efficiency in the resolution of disputes. That is in the interest of the courts, and of litigants.

B. The Relitigation Exception And Its Limitations Accord With Principles Of Federalism.

Because the relitigation exception enables federal courts to enjoin state proceedings, an injunction must balance state and federal interests. Cognizant of these implications, the federal courts have developed several limitations on the exception to ensure that state interests are properly preserved. Thus, the contention by petitioners and their *amici* that the exception must be "narrowly construed" (Pet. Br. 14; see also Am. Assoc. Justice Br. 5), is satisfied not by limiting the Act to certain types of determinations or

cases, but instead by the limiting doctrines that courts already apply to cabin when they will issue injunctions addressing ongoing state-court litigation.

In our federalist system, it is little surprise that state and federal judicial systems may occasionally overlap. Indeed, in certain circumstances, "simultaneous litigation in state and federal courts" may be unavoidable—"one of the costs of our dual court system." *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524-525 (1986). A broadly applicable relitigation exception that is subject to substantial limitations in its exercise properly calibrates the distinct state and federal interests at stake. Compared against similar doctrines that control other intersections between the state and federal judicial systems, it is apparent that the balance struck by the relitigation exception and its limitations lies in the heartland of appropriate federalism.

1. Several well-established limitations on the relitigation exception ensure that state interests are protected.

Several overlapping doctrines limit the applicability of the relitigation exception. These doctrines, alone and in combination, operate to protect state courts from inappropriate interference.

Final resolution. The relitigation exception attaches only to a select set of federal judicial decisions. By its terms, the exception applies to "judgments" rendered by a federal court. Although judgments in this context is a necessarily broad concept due to the incorporation of collateral estoppel principles (see 17A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 4226 (3d ed. 2010)), the "judgment" requirement creates tangible limitations nonethe-

less. See Fed. R. Civ. P. 54(a) (defining judgment for purposes of the Federal Rules of Civil Procedure as "a decree and any order from which an appeal lies"). Non-final, temporary, or intermediary decisions cannot form the basis for an injunction. For example, the exception does not attach to a federal court's rejection of a provisional class settlement, because such an order is inherently transitory. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (*In re G.M.*), 134 F.3d 133, 146 (3d Cir. 1998). On the other hand, just as an appellate court may review any order incorporated by a judgment, so too does the relitigation exception attach to "any order from which an appeal lies" and any order necessary to a court's judgment.

Full faith and credit. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts must respect state court judgments regarding issue or claim preclusion. In *Parsons Steel*, 474 U.S. at 524, the Court harmonized the Anti-Injunction Act with the Full Faith and Credit Act by explaining that the relitigation exception of the Anti-Injunction Act is applicable only "to those situations in which the state court has not yet ruled on the merits of the res judicata issue." If a state court "has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." *Ibid.* As a result, "[c]hallenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court." *Id.* at 525. In this way, federal courts cannot become a forum to re-

litigate state judgments. See *In re G.M.*, 134 F.3d at 141-143.[2]

Temporality. The relitigation exception also applies only to judgments that a federal court has already entered. A party cannot seek to enjoin state proceedings on the basis of a judicial order that could be entered in the future. See *Garcia* v. *Bauza-Salas*, 862 F.2d 905, 910 (1st Cir. 1988) ("Since the Commonwealth litigation was concluded before any federal determinations were made, the injunction was not necessary either to prevent relitigation of matters already decided or to protect a judgment previously entered by a federal court."). In other words, a litigant may not use the Act preemptively.

Limited *res judicata*. A number of courts have limited the scope of the *res judicata* doctrine incorporated by the relitigation exception, holding that "the relitigation exception's incorporation of res judicata extends only to those claims *actually litigated* in federal court, not to claims which merely could have been litigated." *Jones* v. *St. Paul Cos.*, 495 F.3d 888, 892 (8th Cir. 2007) (emphasis added). These courts cite *Chick Kam Choo* for the proposition that the relitigation exception only "authorizes injunctions against state adjudication of issues that 'actually have been decided by the federal court.'" *Weyerhaeuser Co.* v. *Wyatt*, 505 F.3d 1104, 1110 (10th Cir. 2007) (quoting *Chick Kam Choo*, 486 U.S. at 148). To the

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[2] This restriction is informed by the *Rooker-Feldman* doctrine, which generally prohibits "review of state court judgments." *In re G.M.*, 134 F.3d at 143.

extent that this approach is valid,[3] it may establish another limitation on the relitigation exception.

Equitable discretion. Importantly, because the All Writs Act is permissive rather than mandatory, a district court retains substantial discretion to determine whether enjoining state proceedings is appropriate in any given case. As is true across the federal courts' exercise of equitable remedies (see, *e.g.*, *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388 (2006)), "the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." *Chick Kam Choo*, 486 U.S. at 151 (emphasis in original). See also *Bailey* v. *State Farm Fire & Cas. Co.*, 414 F.3d 1187, 1191 (10th Cir. 2005). Rather, "an injunction, even where allowed by the letter of the relitigation exception, remains permissive at the discretion of the federal court, which discretion should be exercised in the light of the historical reluctance of federal courts to interfere with state judicial proceedings." *Blanchard 1986, Ltd.* v. *Park Plantation, LLC*, 553 F.3d 405, 407-408 (5th Cir. 2008) (internal quotations omitted).

Accordingly, even after the threshold criteria for the relitigation exception are satisfied, a federal court must nonetheless consider whether an injunction is warranted given the totality of the circumstances. *Brown* v. *McCormick*, 608 F.2d 410, 416 (10th Cir. 1979) ("Analysis by a federal court necessarily includes general equitable principles for issuing an injunction."). Principles of comity essential to fede-

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[3] Some courts, like the Ninth Circuit, "disagree with those Circuits which have concluded that the relitigation exception is limited to issues 'actually litigated' in a prior court proceeding." *Western Sys., Inc.* v. *Ulloa*, 958 F.2d 864, 870 (9th Cir. 1992)

ralism feature prominently in this analysis. See, *e.g.*, 17A Wright & Miller, *supra*, § 4226. Likewise, when a federal court decides to issue an injunction, these same considerations inform the scope and features of the particular injunctive relief. Federal courts are well equipped to protect state interests through the careful exercise of judicial discretion.

2. The relitigation exception appropriately calibrates federal and state interests.

The relitigation exception and its limitations strike the correct balance between state and federal interests. Given the overlapping nature of the state and federal courts, the dual judicial systems intersect in a host of different ways. Across these varying doctrines, one theme holds common: state and federal interests are balanced by broad rules that are checked by limited exceptions, and federal courts are empowered with discretionary tools to ensure the proper calibration of federalism.

For nearly one hundred and fifty years, federal courts have employed the relitigation exception in a manner respectful of the balance between state and federal interests. Indeed, in 1941, Justice Reed noted that "for more than half a century there has been a widely accepted rule supporting the power of federal courts to prevent relitigation." *Toucey*, 314 U.S. at 152-153 (Reed, J., dissenting). And long before *Toucey*, in *French* v. *Hay*, 89 U.S. (22 Wall.) 250, 253 (1874), the Court explained that the Anti-Injunction Act "has no application" where a federal court has already exercised jurisdiction over a matter. A rule to the contrary, this Court found, would constitute "a great defect in our Federal jurisprudence" and "a reproach upon the administration of justice," because it would render federal judgments "nullities" and re-

quire the parties to "engage[e] in a new conflict elsewhere." *Ibid.* It is as true today as it was in 1874 that such an approach "would be contrary to the plainest principles of reason and justice." *Ibid.* See also *Dietzsch* v. *Huidekoper*, 103 U.S. (13 Otto) 494, 497 (1880) ("[T]he court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by a direct proceeding.").

When Congress codified the relitigation exception, it embraced the balance of federalism long adopted by this Court. It was the balance "indispensable to the harmonious working of our systems of federal and state jurisprudence." *Starr* v. *Chicago R.I. & Pac. Ry.*, 110 F. 3, 6 (D. Neb. 1901), aff'd sub nom. *Prout* v. *Starr*, 188 U.S. 537 (1903). The relitigation exception thus "represent[ed] Congress' considered judgment as to how to balance the tensions inherent in [a federal] system." *Chick Kam Choo*, 486 U.S. at 146.

The same balancing approach is also evident in discretionary abstention doctrines this Court has adopted to mitigate friction between state and federal courts in other contexts. The Court has "held that federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quotation and citations omitted).

Under the *Colorado River* doctrine, for example, principles underscoring the "regard for federal-state relations" have led to limited "circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration." 424 U.S. at 817-818. This analysis, which seeks to preserve both federalism and judicial efficiency, turns on the discretion of the federal court: "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums." *Id.* at 818 (citations omitted). The balance here is no different.

Likewise, even absent concurrent state proceedings, the *Burford* abstention doctrine balances state and federal interests where "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River*, 424 U.S. at 814. See *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). Like others, this doctrine is designed to break the "whole cycle of federal-state conflict." *Burford*, 319 U.S. at 332. Again, the discretion of federal courts is critical to appropriately balance state and federal interests.

The discretionary approach to the intersection of state and federal interests is also evident in the *Ex parte Young* doctrine. In *Ex parte Young*, 209 U.S. 123 (1908), the Court found that state officials may be sued in federal court, notwithstanding protections created by the Eleventh Amendment. But the Court has "described certain types of cases that formally

meet the *Young* requirements of a state official acting inconsistently with federal law * * * that [nonetheless] stretch that case too far and would upset the balance of federal and state interests that it embodies." *Papasan* v. *Allain*, 478 U.S. 265, 277 (1986). Thus *Ex parte Young* is restrained to focus on prospective conduct, not relief for past wrongs. *Id.* at 277-278. Although the federal courts may hold substantial power over state interests, state interests are preserved via judicial discretion. See *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 278 (1997) ("Our recent cases illustrate a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case.").[4]

Congress too has struck the same balance between state and federal courts. The recent Class Action Fairness Act (CAFA), Pub. L. 109-2, 119 Stat. 9, is one highly analogous example of a careful balancing of state and federal interests. There, Congress expanded federal jurisdiction over class actions by, among other provisions, providing for minimal diversity and aggregated damages for amounts in controversy. It did so, in part, because it found that parallel state and federal proceedings generate "enormous waste" because "multiple judges of different courts must spend considerable time adjudicating precisely

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[4] Many other doctrines incorporate a similar balancing approach. The Court has taken precisely the same tact, for example, in balancing state criminal proceedings with federal civil rights actions. In *Younger* v. *Harris*, 401 U.S. 37, 46 (1971), the Court noted "the fundamental policy against federal interference with state criminal prosecutions." But against this general principle that federal courts must abstain from state criminal proceedings, the Court recognized several circumstances in which federal action would be justified. *Id.* at 45, 53-55.

the same claims asserted on behalf of precisely the same people." S. Rep. No. 109-14, at *23 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 23. This waste occurs because "[p]laintiffs' lawyers frequently file copycat class actions in various state courts around the country, clogging judges' dockets and forcing judges to duplicate each other's work." *Id.* at 60. "[E]fficiency and fairness," Congress ultimately concluded, were best served by consolidating claims in federal courts. *Id.* at 38.

Not only does federal jurisdiction create efficient resolution of claims, but Congress determined that expanded federal court jurisdiction over class actions was an appropriate balance of state and federal interests. "The effect of class action abuses in state courts is being exacerbated by the trend toward 'nationwide' class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles." S. Rep. No. 109-14, at *24. Indeed, Congress was of the view that precluding federal primacy in class actions "flies in the face of basic federalism principles by embracing the view that other states should abide by a deciding court's law whenever it decides that its own laws are preferable to other states' contrary policy choices." *Id.* at 26.

Congress's solution, therefore, was to expand the federal courts' jurisdiction over class action proceedings. But Congress nonetheless recognized that state interests necessitated keeping some actions in state court. Congress carved out certain exceptions to federal jurisdiction over class actions, such as actions that involve less than an aggregate amount of $5 million (28 U.S.C. § 1332(d)(2)) as well as other suits that are substantially local in nature (*id.*

§ 1332(d)(4)). Moreover, for the category of cases in which state and federal actions most overlap, Congress bestowed discretion on the federal courts to consider the "interests of justice" and the "totality of the circumstances" to determine whether an action belongs in a state or federal forum. *Id.* § 1332(d)(3).

The relitigation exception strikes the same chord. Although federal courts have the ability to protect their decisions against collateral challenge in state courts, several limitations ensure that state interests are preserved. And even when an injunction is permissible, federal courts must nonetheless exercise discretion in deciding whether an injunction is appropriate. This doctrine, accordingly, represents the consistent doctrine this Court and Congress have taken to balancing the federalism interests inherent in our nation's overlapping judicial systems.

C. The Lower Courts Properly Invoked The Relitigation Exception.

Here, the relitigation exception properly supports an injunction of the state court proceeding. Respondent has addressed this point exhaustively (see Resp. Br. 17-30), so suffice it to say that the federal court's denial of class certification in this case is precisely the sort of decision to which collateral estoppel may attach. And none of the relevant limitations find applicability here. No state court, for example, has previously adjudicated the collateral estoppel value of the federal decision in *McCollins*. Moreover, *McCollins* decided the same issues implicated by *Smith*. The district court, therefore, was correct to exercise its discretion and subsequently conclude that equity warranted an injunction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2010

APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.[1]

3M
Altec Industries
Altria Client Services Inc.
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler Group LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation

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[1] As of December 17, 2010.

Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Niro Inc.
Nissan North America, Inc.

Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

AMICUS CURIAE BRIEF

No. 09-1205

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

KEITH SMITH AND SHIRLEY SPERLAZZA,

Petitioners,

v.

BAYER CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF STEVEN J. THOROGOOD & MARTIN MURRAY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Thorogood v. Sears, Roebuck & Co., 595 F.3d 750 (7th Cir. 2010)	1
Thorogood v. Sears, Roebuck & Co., No. 10-2407, 2010 WL 4286367 (7th Cir. Nov. 2, 2010)	2, 5, 8

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INTEREST OF *AMICI CURIAE*

Amici Steven J. Thorogood ("Thorogood") and Martin Murray ("Murray"), submit this brief as *amici curiae* in support of Petitioners, Keith Smith and Shirley Sperlazza ("Petitioners"), before this Court in favor of reversal.[1] Both the *Thorogood*[2] and *Murray*[3] litigations present similar issues of law that are relevant to the adjudication of this case.

Thorogood, originally certified by the United States District Court for the Northern District of Illinois ("Illinois Federal District Court") to proceed as a 29-jurisdiction class, was reversed and ordered decertified by the Seventh Circuit, upon Federal Rule of Civil Procedure 23(f) review. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008) ("*Thorogood I*"). Thereafter, Defendant Sears Roebuck & Co. ("Sears") mooted Thorogood's individual claim involuntarily by offer of judgment. *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010) ("*Thorogood II*").

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1. No counsel for a party authored this brief in whole or in part, and no such counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have provided their consent to the filing of this brief, which have been included with Amici's submission to the Court.

2. *Thorogood v. Sears Roebuck & Co.*, Case No. 6-C-1999 (N.D. Ill.).

3. *Murray v. Sears Roebuck & Co.*, Case No. c-09-5774-cw (N.D.Cal).

Murray, a California resident, subsequently brought similar, but not identical consumer fraud claims in California, asserting purely California state claims based on California substantive law for a single-state California class of consumers. *Murray v. Sears, Roebuck & Co.*, et al, No. c-09-5744-cw (N.D.Cal.). When the United States District Court for the Northern District of California ("California Federal District Court") upheld the complaint and permitted the case to proceed, Sears returned to the closed *Thorogood* case, and asked the Illinois Federal District Court to enjoin all absent members of the decertified class from litigating class claims, anywhere. The Illinois Federal District Court denied the requested All Writs Act, 28 U.S.C. § 1651 ("All Writs Act") injunction, but the Seventh Circuit recently reversed that denial, and ordered the Illinois Federal District Court to enjoin all of the non-noticed members of the decertified class, and their counsel from pursuing their claims as class claims against Sears,[4] anywhere in any court. *Thorogood v. Sears, Roebuck & Co.*, No. 10-2407, 2010 WL 4286367 (7th Cir. Nov. 2, 2010) ("*Thorogood III*"). Thorogood has requested rehearing, and therefore the matter is not yet ripe for petition for *certiorari*; however, Thorogood's case differs from the case at bar only in certain respects.[5]

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4. The Seventh Circuit permits them to continue their California case as a class claim against the manufacturer Electrolux.

5. Namely, the *Thorogood* decision applies the same bar to a decertified class, which, because of the Rule 23(f) review process, never received notice of pendency or an opportunity to opt out, as opposed to the case at bar, where the class was never certified.

Due to these pending cases, *Amici* counsel wish to supplement Petitioners' argument to underscore the need for and desirability of a clear direction in the law that will provide bright-line guidance for plaintiffs and defendants alike, and eliminate substantial uncertainty in subsequent litigation.

SUMMARY OF ARGUMENT

The Court's reaffirmation of *Phillips Petroleum Co. v. Shutts*[6] clear and concise rule of law—that absent class members are bound only after receiving notice of pendency and the opportunity to opt out, and not by mere "adequate representation" alone—is a rare opportunity[7] for the Court to provide a clear and simple roadmap for defendants, plaintiffs and courts, alike, which is easily navigable, with predictable results and reach. In contrast, the Seventh and Eighth Circuit's current "mere adequacy alone" standard provides neither a clear standard, nor any predictability of application, and exacerbates uncertainty in class action litigation.

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6. 472 U.S. 797 (1985)

7. *See* Adam Liptak, *Justices Are Long on Words But Short on Guidance*, N.Y. Times, November 17, 2010, at A1, reporting lower courts' difficulties in discerning clear directions from lengthy multi-author opinions."

ARGUMENT

I. Reaffirming *Shutts*' Plain Directive Will Provide Clarity and a Simple Rule Whose Application and Reach Are Definite and Easy to Follow, Benefiting Defendants, Plaintiffs and the Courts Alike.

While *Amici* certainly share Petitioners' view of the importance of *Shutts*' protections, it is important not to overlook that *Shutts'* rule also provides an essential clarity that gives both litigants and the courts clear direction in making litigation decisions.

Indeed, *Shutts*' rule speaks advantageously to defendants in class actions, providing that defendants need only afford absent class members minimal due process protections in order to bind them to previous judgments, and also details what defendants need *not* do. *See Shutts*, 472 U.S. at 811-12. Of course, as Petitioners acknowledge, the significance of these privileges is that no absent class member will be bound *in personam* without defendants first satisfying absent class members' minimal due process protections:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide **minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation,** whether in person or through counsel.

Id. at 811-12 (emphasis added).

By the same token, the drafters of the 1966 iteration of Rule 23 believed in some measure that early certification generally benefited defendants because they could gain a comprehensive preclusion from a subsequent dismissal on the merits. *Shutts'* clarity of direction ensures that defendants may readily choose which approach to take—either to seek the benefits of certifying at an early stage—or attack the particular plaintiff's claim, based on the view that, early dismissal, while not preclusive of later claims, generally discourages other plaintiffs from bringing identical class claims.

In contrast, the Eight Circuit's rule in the case at bar, *In re Baycol Prod. Litig.*, 593 F.3d 716,724 (8th Cir. 2010), and the Seventh Circuit's rule in *In re Bridgestone/Firestone*, 333 F.3d 763, 766 (7th Cir. 2003) and *Thorogood III*[8]—that mere "adequate representation" alone satisfies *Shutts'* due process requirements, without notice and an opportunity to opt out, is a subjective standard, which generates unpredictable outcomes and reach in barring absent class members' claims.

Additionally, the Court should make clear that the appropriate rule applies equally for both a never-noticed

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8. *See Thorogood III*, 2010 WL 4286367 at *10 ("It is true as we recall that an unnamed class member can be bound by the judgment in a class action suit only if 'adequately represented by a party who actively participated in the litigation' *Taylor v. Sturgell* ,[553 U.S. 880, 884 (2008)]. But Thorogood did participate actively in seeking class certification, and his representation by lawyer Krislov was adequate (it was energetic and pertinacious to a fault).").

absent member of a (b) (3) uncertified class[9] and a never-noticed absent member of a previously-certified one.[10] Both parties are functionally the same, as neither party has been afforded even minimal due process requirements in either circumstance.

II. The "Mere Adequacy" Standard Creates Uncertainty Regarding When Collateral Estoppel Applies, and is Unpredictable in its Scope and Reach.

Even assuming that the first court evaluates "adequacy" on some satisfying-but-undefined basis, the determination of what claims are subsequently estopped or enjoinable has been and is at present completely unpredictable. Initially, the Seventh Circuit's *Bridgestone/Firestone* foray into the "mere adequacy alone" standard held that reversing the certification of a nationwide consumer class did not preclude class members from bringing subsequent single-state class claims in the state court of their residence, alleging that state's consumer protection laws.[11]

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9. *See Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1314–15 (4th Cir. 1978) ("a pre-certification dismissal does not legally bind absent class members.").

10. *See Smith v Shawnee Library Sys.*, 60 F.3d 317, 321 (7th Cir. 1995) ("summary judgment was granted before notification was made" and "class certification was void because no notice was ever given to the absent members of [the] certified class.").

11. *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763, 766 (7th Cir. 2003) ("The only classes that had been certified had national scope .... the only *judgment* that could be protected or (Cont'd)

In the case at bar, the Eighth Circuit relies on *Bridgestone Firestone* to enjoin never-certified absent class members from pursuing their class claims, but it does so without providing any rationale or guidance for expanding that preclusion to further bar all single-state claims, even when those claims involve procedural distinctions (which the Eight Circuit does not address). *In re Baycol Prod. Litig.*, 593 F.3d at 723.

The dilemma is nicely exemplified by the Seventh Circuit's Rule 23(f) reversal of the 29-jurisdiction class in *Thorogood* (presumed to be permitted by *Bridgestone/Firestone*, to pursue subsequent single-state class actions) after Murray, an absent California resident, reasonably filed a California state case for a single-state California class, asserting only California law claims.

After the California Federal District Court denied defendants' motion to strike class allegations rejecting a plea of collateral estoppel, *Murray v. Sears, Roebuck & Co.*, et al, No. c-09-5744-cw, Dkt. No. 120 (N.D.Cal.) (order denying motion to strike class allegations), Sears returned to the closed *Thorogood* case in the Illinois Federal District Court—seeking an All Writs Act injunction. The Seventh Circuit surprisingly reversed

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(Cont'd)
effectuated is one concerning such classes .... The district court had not certified, and our opinion thus did not address, any statewide class."; *see also Id.* at 769 (recognizing that when only "one vital issue was litigated and resolved on a class-wide basis: whether a *national* class is tenable" only the adjudication of that specific issue could have a preclusive effect.) (emphasis in the original).

the Illinois Federal District Court's denial, and ordered that the never-noticed but decertified class be enjoined from pursuing *any* of their claims against Sears. *Thorogood III*, at 4.[12]

Further displaying the dilemma created by the current ambiguity of the law, the Seventh Circuit effectively directed how litigation is to proceed in the California Federal Court—a district court subject to the Ninth Circuit's purview—without indicating what parties are to do if the district court has a different view of how the case should proceed, despite even its own holding that "one court of appeals need not automatically follow the decision of another[.]" *Brotherhood of Maint. of Way Employees v. Burlington N. R.R Co.*, 24 F.3d 937, 939 (7th Cir. 1994).[13]

The benefits of a clear directive from this Court are thus self-evident, and would undoubtedly obviate this nascent type of cross-circuit management conflict. *See*

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12. Exacerbating this confusion is the fact that since Murray's California complaint also asserted claims against the manufacturer, an additional defendant, the Seventh Circuit ruled that the enjoined parties and counsel could proceed ahead against the manufacturer.

13. *See also Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 329 (3rd Cir. 2007) (holding that "each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court .... Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principle of res judicata (or collateral estoppel) by the court in which the action is still pending") (internal citation omitted).

Negrete v. Allizanz Life Ins. Co. of North America, 532 F.3d 1091 (9th Cir. 2008) (refusing an injunction under the All Writs Acts and recognizing the "lack of cases in which the All Writs Act has been used to enjoin" federal courts).

CONCLUSION

Reaffirming *Shutts*' clear and simple directive and further elaborating on the collateral estoppel effect of court judgments would not only protect absent class members' fundamental due process rights, it would allow clear direction, easily complied with and predictable in their reach—beneficially simplifying an aspect of modern complex class litigation. The Court should reaffirm *Shutts*' clear declaration of the law and reverse the Eighth Circuit's decision below.

Respectfully Submitted,

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